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# TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908

No. 248.

JAMES RUDOLPH GARFIELD, SECRETARY OF THE INTERIOR, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA, EX RELATIONE JOHN E. GOLDSBY.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED JANUARY 11, 1909.

(20975)

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1907.

## No. 572.

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JAMES RUDOLPH GARFIELD, SECRETARY OF THE INTERIOR, PLAINTIFF IN ERROR,

*vs.*

THE UNITED STATES OF AMERICA, EX RELATIONE JOHN E. GOLDSBY.

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IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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# In the Court of Appeals of the District of Columbia.

No. 1829.

JAMES RUDOLPH GARFIELD, Secretary of the Interior, Appellant,
*vs.*
THE UNITED STATES OF AMERICA *ex Relatione* JOHN E. GOLDSBY.

a Supreme Court of the District of Columbia.

At Law. No. 49354. Mandamus.

THE UNITED STATES OF AMERICA *ex Relatione* JOHN E. GOLDSBY, Petitioner,
*vs.*
JAMES RUDOLPH GARFIELD, Secretary of the Interior, Respondent.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

Be it remembered, That in the Supreme Court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:—

1 *Petition.*

Filed April 15, 1907.

In the Supreme Court of the District of Columbia.

At Law. No. 49354. Mandamus.

THE UNITED STATES OF AMERICA *ex Relatione* JOHN E. GOLDSBY, Petitioner,
*vs.*
JAMES RUDOLPH GARFIELD, Secretary of the Interior, Respondent.

Your petitioner respectfully represents:

1. That he is a citizen of the United States and is a citizen, member and resident of the Chickasaw Nation in the Indian Territory and a Chickasaw Indian by blood.

2. That the respondent, James Rudolph Garfield, is a citizen of the United States, temporarily residing in the District of Columbia,

and is an officer of the Government of The United States and Secretary of the Interior in said Government, and is sued as such, having succeeded on March 5, 1907, as said Secretary of the Interior *the* Ethan A. Hitchcock, hereinafter mentioned.

3. That as heretofore stated, respondent's immediate predecessor in office as Secretary of the Interior was Ethan A. Hitchcock, to whom as said Secretary of the Interior was committed by Congress under certain laws hereinafter referred to the duty of final action on

2 applications for citizenship in the Five Civilized Tribes in the Indian Territory and of approving the enrollment of those applicants whom he should deem entitled to be placed on the final rolls of members or citizens of any one of the Five Civilized Tribes or Nations, the Chickasaw Tribe or Nation being one of the said Five Civilized Tribes or Nations. A copy of so much of the several laws or acts of Congress as relate to the subject of citizenship in said Five Civilized Tribes is attached hereto marked Petitioner's Exhibit A-1 and is prayed to be read as a part hereof, the same as though incorporated herein.

4. That by certain treaties and agreements between the United States and the Choctaw and Chickasaw Nations known as the Choctaw treaty of September 27, 1830, (7 Stat. at Large, 333) and the consolidated Choctaw and Chickasaw treaty of June 22, 1855, proclaimed by the President of the United States March 4, 1856, (11 Stat. at Large, 611) the United States in exchange for certain lands of said tribes or nations east of the Mississippi river and certain other good and valuable considerations from said Indian tribes or nations and each of them to the United States moving caused to be conveyed to the Choctaw and Chickasaw Nations the tract of country west of the Mississippi River whereon said Choctaw and Chickasaw Nations, including your petitioner, now reside, said land being conveyed "in fee simple to them and their descendants, to inure to them while they shall exist as a nation and live on it" and the United States by the aforesaid treaty proclaimed March 4, 1856, covenanting that they did thereby

"forever secure and guarantee the lands embraced within
3 the said limits (including the land allotted to your petitioner as hereinafter stated), to the members of the Choctaw and Chickasaw tribes, their heirs and successors, to be held in common, so that each and every member of either tribe shall have an equal, undivided interest in the whole: *Provided, however*, That no part thereof shall ever be sold without the consent of both tribes, and that said land shall revert to the United States if said Indians and their heirs become extinct or abandon the same."

5. That said Indians and their heirs have not become extinct and have not abandoned the said land or any part thereof; that the reversionary interest of the United States in said lands has been otherwise terminated and surrendered to said Indians by the Acts of Congress, treaties and agreements herein mentioned, as the Secretary of the Interior has heretofore admitted; that your petitioner is and likewise has been long recognized by the Choctaw and Chicka-

saw Nations as a Chickasaw Indian by blood; that your petitioner is one of the heirs of the Indians referred to in the said treaty proclaimed in 1856 and as such was entitled prior to allotment as hereinafter mentioned to an equal undivided interest in the whole of the lands of the Choctaw and Chickasaw Nations after certain lands were duly and lawfully reserved for town site, charitable and certain specified purposes in accordance with Acts of Congress and agreements duly entered into and approved and ratified by the nations, parties thereto, between the United States and the Choctaw and Chickasaw Nations; and is now the owner of and is possessed
4 in vested right of a lawful allotment of land in the Chickasaw Nation and is further entitled to an equal, undivided distributive share in the funds and surplus lands of the Choctaw and Chickasaw Nations after allotments, as hereinafter referred to, are made to all the duly enrolled members of the Choctaw and Chickasaw Nations.

6. That under the provisions of various acts of Congress a Commission to the Five Civilized Tribes was created for the purpose, among other things, of making agreements with each of the Five Civilized Tribes for the division in severalty among their citizens or members of the lands held by them in common, of enrolling under the direction and approval of the Secretary of the Interior the members or citizens of each and every one of the Five Civilized Tribes and of allotting in severalty in fee simple to the members of the Choctaw and Chickasaw Nations the lands held by said nations as above set forth. That under the provisions of said Acts of Congress, of agreements effected in accordance therewith, and of treaties between the United States and said Indian tribes rolls of members of each of the tribes were directed to be prepared by said Commission under the supervision of the Secretary of the Interior from time to time and it was provided that when the enrollment of any person as a member of any one of the Five Civilized Tribes should be approved by the Secretary of the Interior his name should be placed on the final roll of said tribe, and he thereby should become and be a member of the said tribe or nation and entitled to an allotment, in the Choctaw and Chickasaw Nations, of 320 acres
5 of average allottable land in said nation, and to the other rights and privileges common to citizens of said nation.

That by the Act of June 10, 1896, (29 Stat. 321, 329) it was provided

"that the rolls of citizenship of the several tribes as now existing are hereby confirmed"

and that either the Commission to the Five Civilized Tribes or the legally constituted court or committee on citizenship of the several tribes should determine, after hearing, the applications of persons claiming right to be admitted and enrolled in the several nations, either the tribe or any person aggrieved by any decision of the tribal authorities or the Commission to the Five Civilized Tribes to have the right of appeal within a limited time from such decision

to the United States district court, whose decision should be final, and the rolls thus prepared it was provided

"shall be, and are hereby, made rolls of citizenship of said nations or tribes,"

and should be filed with the Commissioner of Indian Affairs

"to remain there for use as the final judgment of the duly constituted authorities."

That by the Act of June 7, 1897, (30 Stat., 62, 84), it was provided that the words "rolls of citizenship" as used in the act of June 10, 1896,

"shall be construed to mean the last authenticated rolls of
6 each tribe which have been approved by the council of the nation, and the descendants of those appearing on such rolls, and such additional names and their descendants as have been subsequently added, either by the council of such nation, the duly constituted courts thereof, or the commission under the Act of June 10, 1896."

It was provided that all other names appearing upon such rolls, and not confirmed by the Act of June 10, 1896, as herein construed, might within six months from the passage of the act be stricken from the rolls

"where the party affected shall have ten days' previous notice that said commission will investigate and determine the right of such party to remain upon such roll as a citizen of such nation,"

provided, however, that the person so stricken from the rolls should have a right of appeal to the United States district court.

That by the Act of June 28, 1898 (30 Stat. 495-503) after making special and separate provision as to citizenship in the Cherokee Nation it was provided:

"Said commission is authorized and directed to make correct rolls of the citizens by blood of all the other tribes, eliminating from the tribal rolls such names as may have been placed thereon by fraud or without authority of law, enrolling such only as may have lawful right thereto, and their descendants born since such rolls were made.

* * * * * * *

7 "The rolls so made, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon, with their descendants thereafter born to them, with such persons as may intermarry according to the tribal laws, shall alone constitute the several tribes which they represent."

That by the Act of May 31, 1900 (31 Stat. 221-236) it was provided that the commission

"shall not receive, consider, or make any record of any application of any persons for enrollment as a member of any tribe of the Indian Territory who has not been a recognized citizen thereof and duly and lawfully enrolled or admitted as such, and its refusal of

such application shall be final when approved by the Secretary of the Interior."

That by the Act of March 3, 1901 (31 Stat. 1058-1077) it was provided that

"the rolls made by the Commission to the Five Civilized Tribes, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon shall alone constitute the several tribes which they represent"

and the Secretary of the Interior was directed to fix a time by agreement or otherwise,

"for closing said rolls, after which no name shall be added thereto."

8 That by the Act of July 1, 1902 (32 Stat. 641) ratifying an agreement between the United States and the Choctaw and Chickasaw Nations it was provided that the rolls of citizenship of the Choctaw and Chickasaw citizens should be made in strict compliance with the acts of Congress approved June 28, 1898, and May 31, 1900, aforesaid, provided, however, that no persons claiming right to enrollment or allotment by virtue of a judgment of the United States district court under the act of June 10, 1896, and which right is contested by legal proceedings instituted under the provisions of this agreement

"shall be enrolled or receive allotment of lands until his right thereto has been finally determined."

By Section 30 of said agreement it was provided:

30. For the purpose of expediting the enrollment of the Choctaw and Chickasaw citizens and the Choctaw and Chickasaw freedmen, the said Commission shall, from time to time and as early as practicable, forward to the Secretary of the Interior lists upon which shall be placed the names of those persons found by the Commission to be entitled to enrollment. The lists thus prepared, when approved by the Secretary of the Interior, shall constitute a part and parcel of the final rolls of citizens of the Choctaw & Chickasaw tribes and of Choctaw and Chickasaw freedmen, upon which allotment of land and distribution of other tribal property shall be made as herein provided. Lists shall be made up and for-

9 warded when contests of whatever character shall have been determined, and when there shall have been submitted to and approved by the Secretary of the Interior lists embracing names of all those lawfully entitled to enrollment, the rolls shall be deemed complete. The rolls so prepared shall be made in quintuplicate, one to be deposited with the Secretary of the Interior, one with the Commissioner of Indian Affairs, one with the principal chief of the Choctaw Nation, one with the governor of the Chickasaw Nation, and one to remain with the Commission to the Five Civilized Tribes."

By Section 31, it was provided that inasmuch as it was claimed by the Choctaw and Chickasaw Nations that the United States courts

acting under the Act of June 10, 1896, had admitted persons to citizenship or enrollment in the Choctaw and Chickasaw Nations without notice to both nations and had tried citizenship appeals *de novo* that there should be created a Choctaw and Chickasaw Citizenship court to determine whether the United States district court had proceeded according to law and which if it decided adversely to the United States district courts procedure should have the right to determine the citizenship case of any person thus deprived of a favorable judgment upon his claimed citizenship and the judgment of the citizenship court should be final.

That by the Act of April 21, 1904, (33 Stat. 189-204) it was provided that the Commission to the Five Civilized Tribes should conclude its work on or before July 1, 1905 and cease thereafter to exist.

10 That by the Act of March 3, 1905 (33 Stat. 1048-50) it was provided that the Secretary of the Interior should complete the unfinished business of the Commission to the Five Civilized Tribes and there was conferred on him all the powers heretofore granted to the said Commission.

That by the act of April 26, 1906 (34 Stat., 137), it was provided that no person should be enrolled unless application for enrollment was made prior to December 1, 1905, and the rolls of citizenship were required to be completed by March 4, 1907.

7. That on or about October 6, 1905, the Secretary of the Interior affirmed a decision by the Commission to the Five Civilized Tribes holding that petitioner and his children were entitled to enrollment and after a full and careful inquiry into the right of petitioner and his children and of the record in the case, and without any fraud, concealment or artifice on the part of petitioner as to any matter of fact or law, either pertinent or impertinent or material or immaterial or relevant or irrelevant as to his right to enrollment, the name of petitioner was on or about October 6, 1905, duly and regularly ordered placed on the final roll of citizens by blood of the Chickasaw Nation and thereafter a list containing the names of those persons found by the Commission to the Five Civilized Tribes, under the direction and with the approval of the Secretary of the Interior, entitled to enrollment, was prepared in the form of a roll of citizens of the Choctaw and Chickasaw Tribes and said list, on which appears the name of your petitioner as one of the citizens of the

11 Choctaw and Chickasaw Tribes entitled to enrollment was duly and regularly approved by the then Secretary of the Interior as a part and parcel of the final rolls of citizens of the Choctaw and Chickasaw Tribes and as entitling petitioner to an allotment of lands and distribution of tribal property of the said tribes, the names, etc., of your petitioner and his children, Linniel E., Bessie and Murray Milton Goldsby being duly entered and appearing on the regularly authenticated and approved final rolls of the citizens by blood of the Chickasaw Nation as follows:

*Chickasaw Roll—Citizens by Blood.*

| | | Age. | Sex. | Blood. | Census card No. |
|---|---|---|---|---|---|
| * | * * * * * | * | * | * | * |
| 4984 | Goldsby, John E..... | 44 | M. | 1/32 | 1697 |
| 4985 | Goldsby, Linniel E..... | 16 | M. | 1/64 | 1697 |
| 4986 | Goldsby, Bessie..... | 13 | F. | 1/64 | 1697 |
| 4987 | Goldsby, Murray Milton ..... | 4 | M. | 1/64 | 1697 |
| * | * * * * * | * | * | * | * |

(* Marks indicating there are other names on the rolls.)

That said final roll was, on, to wit, the 27th day of March, 1906, duly and regularly approved by the then lawful incumbent of the office of Secretary of the Interior as evidenced by the following genuine and regular notation at the bottom of said approved final roll:

Washington, D. C., November 27, 1905.
Approved:

THOS. RYAN,
*First Assistant Secretary.*

L. R. S.

12 That Thomas Ryan at this time was, and still is, First Assistant Secretary of the Interior, and at the time of approval of said roll was authorized by law and by the then Secretary of the Interior to approve said roll and affix his (said Ryan's) signature thereto as evidencing the due and regular approval of said roll.

A copy of the letter of the Acting Secretary of the Interior ordering the placing of your petitioner's name on the final approved roll of the citizens by blood of the Chickasaw Nation is attached hereto marked Petitioner's Exhibit A-2, and is prayed to be read and considered in connection herewith and as a part hereof. That petitioner's enrollment was approved under rules, regulations, custom & practice whereby notice was given of all steps affecting rights of parties with opportunity afforded for appeals & motions for rehearing & review by petitioner or the Choctaw & Chickasaw nations.

8. That prior to the time when, as will appear hereinafter, your petitioner's name was stricken or attempted to be stricken from the final rolls of citizens by blood of the Chickasaw Nation, without notice, as will appear hereinafter, your petitioner duly and regularly selected an allotment of 320 acres of average allottable lands of the Choctaw and Chickasaw Nations and after the name of your petitioner had been duly and regularly placed on the final approved rolls of the citizens by blood of the Chickasaw Nations an allotment certificate was duly and regularly issued to your petitioner for the lands so selected by him by the Commission to the Five Civilized Tribes

and is now held by him as conclusive evidence of the right of
13 your petitioner to the lands so selected by him and described in the allotment certificate aforesaid. That the statutes made and provided under which your petitioner selected the allotment referred to and an allotment certificate was issued to him provide in substance:

Act Approved July 1, 1902 (32 Stat. at Large, 641).

"SECTION 30. For the purpose of expediting the enrollment of the Choctaw and Chickasaw citizens * * * the said Commission (the Commission to the Five Civilized Tribes) shall, from time to time, and as early as practicable, forward to the Secretary of the Interior lists upon which shall be placed the names of those persons found by the Commission to be entitled to enrollment. The lists thus prepared, when approved by the Secretary of the Interior, shall constitute a part and parcel of the final rolls of citizens of the Choctaw and Chickasaw tribes * * * upon which allotment of land and distribution of other tribal property shall be made as herein provided.

"SECTION 11. There shall be allotted to each member of the Choctaw and Chickasaw tribes, as soon as practicable after the approval by the Secretary of the Interior of his enrollment as herein provided, land equal in value to 320 acres of the average allottable land of the Choctaw and Chickasaw Nations * * * as soon as practicable after the approval by the Secretary of the Interior of his enrollment.

"SECTION 23. Allotment certificates issued by the Commission to the Five Civilized Tribes shall be conclusive evidence of
14 the right of any allottee to the tract of land described therein."

9. That after the issuance to petitioner of said allotment certificate, the then Secretary of the Interior, Ethan A. Hitchcock, predecessor in office of respondent as such Secretary of the Interior, arbitrarily, illegally and without notice of any kind whatsoever to your petitioner, who has only just learned what is now alleged to have taken place, undertook to deprive your petitioner of the rights by law vested in him and issued an order, which order, however, your petitioner alleges was inadequate for the purpose even had the Secretary of the Interior lawful right and power so to do, which lawful right and power your petitioner denies, under which your petitioner's name, on some date to your petitioner unknown, though the same was subsequent to the issuance of an allotment certificate to your petitioner by the Commission to the Five Civilized Tribes, was stricken or attempted to be stricken from the aforesaid final approved rolls of citizens by blood of the Choctaw and Chickasaw Nations by the mutilation of said rolls as follows: a line drawn through your petitioner's name thus ["Goldsby, John E."]* and

[*Words enclosed in brackets erased in copy.]

the writing after said name of the following: "See 22,850—1907." Your petitioner on information and belief avers that the changes just described were not noted prior to March 4, 1907, on all five of the rolls required by law to be made and deposited as provided by the act of July 1, 1902. That since the 4th day of March, 1907, there has been written in red ink immediately above the
15 names of your petitioner and his children the words "Cancelled March 4, 1907." That your petitioner is informed and believes that this action was taken upon the supposed theory that your petitioner came within, as to his rights as a citizen of the Chickasaw Nation, an opinion rendered in the month of February, 1907, by the Attorney-General of the United States in some case to which your petitioner was not a party, either directly or indirectly, personally or by representation, and in which your petitioner had no hearing or right to be heard, with the result to deprive your petitioner, unless he be protected by this Honorable Court, of his vested right to a share in the lands and funds of the Choctaw and Chickasaw Nations without due process of law as guaranteed to your petitioner by the Constitution and laws of the United States and also by the Constitution and laws of the Choctaw and Chickasaw Nations.

A true copy of the several orders and papers, or so much thereof as may be material, made in connection with the arbitrary and illegal attempt to deprive your petitioner of his lawful rights is attached hereto marked Petitioner's Exhibit A-3 and is prayed to be considered and made a part hereof as though incorporated herein.

10. Petitioner on information and belief avers that the true present value of the allotment selected by him and to which he has been issued an allotment certificate and of his share in the funds and in the surplus lands of the Choctaw and Chickasaw Nations after all lawful members have been given their lawful share therein is in excess of five thousand dollars.

16 11. Your petitioner further states that he has made demand on the respondent as Secretary of the Interior that he cause the line run through petitioner's name to be erased and the notation placed opposite the name of your petitioner to be erased and to restore your petitioner to the rolls of citizens by blood of the Chickasaw Nation, as fully as he was thereon prior to the hereinbefore mentioned illegal and arbitrary act of respondent's predecessor in office in striking or attempting to strike respondent's name therefrom, but respondent has refused and neglected so to do and on the contrary, as your petitioner is informed and believes, holds that petitioner is not an enrolled member or citizen of the Chickasaw Nation nor entitled to share in its lands and funds and will be required to surrender the land allotted to him. A true copy of the letter of the Secretary of the Interior refusing Petitioner's demand is attached hereto marked Petitioner's Exhibit A-4 and is prayed to be read and considered as though incorporated herein.

Wherefore, inasmuch as the Honorable James Rudolph Garfield, Secretary of the Interior, has refused to restore your petitioner to the approved rolls of members or citizens by blood of the Chickasaw

Nation, to remove the cloud placed by his predecessor in office on your petitioner's rights, claims and demands as an enrolled citizen or member of the Chickasaw Nation and to recognize your petitioner as a lawfully enrolled citizen or member of said nation, and as the law provides no other adequate remedy in the premises whereby your petitioner can be protected in his lawful rights whereof he is now unjustly and arbitrarily deprived, your petitioner
17 prays:

1. That a writ of mandamus may be issued and directed to the Honorable James Rudolph Garfield, Secretary of the Interior, commanding him to erase or cause to be erased the marks or notations made on the approved rolls of the members by blood of the Chickasaw Nation in derogation of your petitioner's rights or claims as a duly and lawfully enrolled blood member of said nation, to restore your petitioner to full and lawful enrollment as a citizen or blood member in said Chickasaw Nation and to recognize your petitioner as a lawful citizen or member by blood of said Chickasaw Nation with all the rights and privileges thereunto appertaining.

2. For such other and further right or rights or relief as to the Court may seem proper and the nature of your petitioner's case may require.

And as in duty bound, your petitioner will ever pray.

JOHN E. GOLDSBY, *Petitioner,*
By C. H. MERILLAT, *Attorney.*

DISTRICT OF COLUMBIA, *ss:*

Before the subscriber, a Notary Public in and for the District of Columbia, on the 15th day of April, A. D., 1907, personally appeared Charles H. Merillat, who made oath on the Holy Evangels of Almighty God that he is the attorney of John E. Goldsby,
18 the within petitioner, and is authorized by him to institute these proceedings: that he has read the petition subscribed and that the facts as set forth in said petition are true to the best of deponent's knowledge and belief.

CHARLES H. MERILLAT.

Subscribed and sworn to before me this 15th day of April, A. D., 1907.

JOHN R. YOUNG, *Clerk.*

19 PETITIONER'S EXHIBIT A-1.

Act of June 10, 1896 (29 Stat., 321-339).

* * * * * * *

That said commission is further authorized and directed to proceed at once to hear and determine the application of all persons who may apply to them for citizenship in any of said nations, and after such hearing they shall determine the right of such applicant to be so admitted and enrolled: *Provided, however,* that such application shall be made to such Commissioners within three months

after the passage of this Act. The said commission shall decide all such applications within ninety days after the same shall be made. That in determining all such applications said commission shall respect all laws of the several nations or tribes, not inconsistent with the laws of the United States, and all treaties with either of said nations or tribes, and shall give due force and effect to the rolls, usages, and customs of each of said nations or tribes: *And provided, further*, That the rolls of citizenship of the several tribes as now existing are hereby confirmed, and any person who shall claim to be entitled to be added to said rolls as a citizen of either of said tribes and whose right thereto has either been denied or not acted upon, or any citizen who may within three months from and after the passage of this Act desire such citizenship, may apply to the legally constituted court or committee designated by the several
20 tribes for such citizenship, and such court or committee shall determine such application within thirty days from the date thereof.

In the performance of such duties said commission shall have power and authority to administer oaths, to issue process for and compel the attendance of witnesses, and *and* to send for persons and papers, and all depositions and affidavits and other evidence in any form whatsoever heretofore taken where the witnesses giving said testimony are dead or now residing beyond the limits of said Territory, and to use every fair and reasonable means within their reach for the purpose of determining the rights of persons claiming such citizenship, or to protect any of said nations from fraud or wrong, and the rolls so prepared by them shall be hereafter held and considered to be the true and correct rolls of persons entitled to the rights of citizenship in said several tribes: *Provided*, That if the tribe, or any person, be aggrieved with the decision of the tribal authorities or the commission provided for in this Act, it or he may appeal from such decision to the United States district court: *Provided, however*, That the appeal shall be taken within sixty days, and the judgment of the court shall be final.

That the said commission, after the expiration of six months, shall cause a complete roll of citizenship of each of said nations to be made upon from their records, and add thereto the names of citizens whose right may be conferred under this Act, and said rolls shall be, and are hereby, made rolls of citizenship of said
21 nations or tribes, subject, however, to the determination of the United States courts, as provided herein.

The commission is hereby required to file the lists of members as they finally approve them with the Commissioner of Indian Affairs to remain there for use as the final judgment of the duly constituted authorities.

Act of June 7, 1897 (30 Stat., 62-84).

That said commission shall continue to exercise all authority heretofore conferred on it by law to negotiate with the Five Tribes, and any agreement made by it with any one of said tribes, when ratified, shall operate to suspend any provisions of this Act if in con-

flict therewith as to said nation: *Provided*, That the words "rolls of citizenship," as used in the Act of June tenth, eighteen hundred and ninety six, making appropriations for current and contingent expenses of the Indian Department and fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, eighteen hundred and ninety-seven, shall be construed to mean the last authenticated rolls of each tribe which have been approved by the council of the nation, and the descendants of those appearing on such rolls, and such additional names and their descendants as have been subsequently added, either by the council of such nation, the duly authorized courts thereof, or the commission under the Act of June tenth, eighteen hundred and ninety-six. And all other names appearing upon such rolls shall be open to investigation by
22 such commission for a period of six months after the passage of this Act. And any name appearing on such rolls and not confirmed by the Act of June tenth, eighteen hundred and ninety-six, as herein construed, may be stricken therefrom by such commission where the party affected shall have ten days previous notice that said Commission will investigate and determine the right of such party to remain upon such roll as a citizen of such nation: *Provided, also*, That any one whose name shall be stricken from the roll by such commission shall have the right of appeal, as provided in the Act of June tenth, eighteen hundred and ninety-six.

Act of June 28, 1898 (30 Stat., 495-502-03). The Curtis Act.

SEC. 21. That in making rolls of citizenship of the several tribes, as required by law, the Commission to the Five Civilized Tribes is authorized and directed to take the roll of Cherokee citizens of eighteen hundred and eighty (not including freedmen) as the only roll intended to be confirmed by this and preceding Acts of Congress, and to enroll all persons now living whose names are found on said roll, and all descendants born since the date of said roll to persons whose names are found thereon; and all persons who have been enrolled by the tribal authorities who have heretofore made permanent settlement in the Cherokee Nation whose parents,
23 by reason of their Cherokee blood, have been lawfully admitted to citizenship by the tribal authorities, and who were minors when their parents were so admitted; and they shall investigate the right of all other persons whose names are found on any other rolls and omit all such as may have been placed thereon by fraud or without authority of law, enrolling only such as may have lawful right thereto, and their descendants born since such rolls were made, with such intermarried white persons as may be entitled to citizenship under Cherokee laws.

* * * * * * *

Said commission is authorized and directed to make correct rolls of the citizens by blood of all the other tribes, eliminating from the tribal rolls such names as may have been placed thereon by fraud or without authority of law, enrolling such only as may have lawful right thereto, and their descendants born since such rolls were

made, with such intermarried white persons as may be entitled to Choctaw and Chickasaw citizenship under the treaties and the laws of said tribes.

* * * * * * *

The rolls so made, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon, with their descendants thereafter born to them, with such persons as may intermarry according to tribal laws, shall alone constitute the several tribes which they represent.

Said Commission shall make such rolls descriptive of the
24 persons thereon, so that they may be thereby identified, and it is authorized to take a census of each of said tribes, or to adopt any other means by them deemed necessary to enable them to make such rolls. They shall have access to all rolls and records of the several tribes, and the United States Court in Indian Territory shall have jurisdiction to compel the officers of the tribal governments and custodians of such rolls and records to deliver same to said Commission and on their refusal or failure to do so to punish them as for contempt; as also to require all citizens of said tribes, and persons who should be so enrolled, to appear before said commission for enrollment, at such times and places as may be fixed by said commission, and to enforce obedience of all others concerned, so far as the same may be necessary, to enable said Commission to make rolls as herein required, and to punish any one who may in any manner or by any means obstruct said work.

Act of May 31, 1900 (31 Stat., 221-236).

That said commission shall continue to exercise all authority heretofore conferred on it by law. But it shall not receive, consider or make any record of any application of any person for enrollment as a member of any tribe in Indian Territory who has not been a recognized citizen thereof, and duly and lawfully enrolled or admitted as such, and its refusal of such applications shall be final when approved by the Secretary of the Interior: *Provided*.
25 That any Mississippi Choctaw duly identified as such by the United States Commission to the Five Civilized Tribes shall have the right, at any time prior to the approval of the final rolls of the Choctaws and Chickasaws by the Secretary of the Interior to make settlement within the Choctaw-Chickasaw country, and on proof of the fact of *bona fide* settlement may be enrolled by the said United States Commission and by the Secretary of the Interior as Choctaws entitled to allotment: *Provided, further*, That all contracts or agreements looking to the sale or incumbrance in any way of the land — be allotted to said Mississippi Choctaws shall be null and void.

The Act of March 3, 1901 (31 Stat., 1058, 1077).

*The rolls made by the Commission to the Five Civilized Tribes, when approved by the Secretary of the Interior, shall be final*, and the persons whose names are found thereon shall alone constitute

the several tribes which they represent; and the Secretary of the Interior is authorized and directed to fix a time by agreement with said tribes or either of them for closing said rolls, but upon failure or refusal of said tribes or any of them to agree thereto, then the Secretary of the Interior shall fix a time for closing said rolls, after which no name shall be added thereto.

26 Act of July 1, 1902, (32 Stat., 641), ratified an agreement made by the Commission to the Five Civilized Tribes with the Commission representing the Choctaw and Chickasaw Tribes. This agreement was subsequently ratified by those two nations as required therein. In regard to rolls of citizenship it provided:

27. The rolls of the Choctaw and Chickasaw citizens and Choctaw and Chickasaw freedmen shall be made by the Commission to the Five Civilized Tribes, in strict compliance with the Act of Congress approved June 28, 1898, (30 Stat., 495), and the Act of Congress approved May 31, 1900 (31 Stat., 221), except as herein otherwise provided: *Provided*, That no persons claiming right to enrollment and allotment and distribution of tribal property, by virtue of a judgment of the United States Court in the Indian Territory under the act of June 10, 1896 (29 Stats., 321), and which right is contested by legal proceedings instituted under the provisions of this agreement, shall be enrolled or receive allotments of lands or distribution of tribal property until his right thereto has been finally determined.

30. For the purpose of expediting the enrollment of the Choctaw and Chickasaw citizens and the Choctaw and Chickasaw freedmen, the said Commission shall, from time to time, and as early as practicable, forward to the Secretary of the Interior lists upon which shall be placed the names of those persons found by the

27 Commission to be entitled to enrollment. The lists thus prepared, when approved by the Secretary of the Interior, shall constitute a part and parcel of the final Choctaw and Chickasaw freedmen, upon which allotment of land and distribution of other tribal property shall be made as herein provided. Lists shall be made up and forwarded when contests of whatever character shall have been determined, and when there shall have been submitted to and approved by the Secretary of the Interior lists embracing names of all those lawfully entitled to enrollment, the rolls shall be made in quintuplicate, one to be deposited with the Secretary of the Interior, one with the Commissioner of Indian Affairs, one with the Principal Chief of the Choctaw Nation, one with the Governor of the Chickasaw Nation, and one to remain with the Commission to the Five Civilized Tribes.

31. It being claimed and insisted by the Choctaw and Chickasaw Nations that the United States Courts in the Indian Territory acting under the Act of Congress approved June 10, 1896, have admitted persons to citizenship or to enrollment as such citizens in the Choctaw and Chickasaw Nations respectively, without notice of the proceedings in such courts being given to each of said nations; and it being insisted by said nations that, in such proceedings,

notice to each of said nations was indispensable, and it being
28 claimed and insisted by said nations that the proceedings in the United States Courts in Indian Territory, under the said Act of June 10, 1896, should have been confined to a review of the action of the Commission to the Five Civilized Tribes, upon the papers and evidence submitted to such commission, and should not have extended to a *tribal de novo* of the question of citizenship; and it being desirable to finally determine these questions, the two nations, jointly, or either of said nations acting separately and making the other a party defendant, may, within ninety days after this agreement becomes effective, by a bill in equity filed in the Choctaw and Chickasaw citizenship court hereinafter named, seek the annulment and vacation of all such decisions by said courts. Ten persons so admitted to citizenship or enrollment by said courts, with notice to one but not to both of said nations, shall be made defendants to said suit as representatives of the entire class of persons similarly situated, the number of such persons being too numerous to require all of them to be made individual parties to the suit; but any persons so situated may, upon his application, be made a party defendant to the suit. Notice of the institution of said suit shall be personally served upon the Chief Executive of the defendant Nation, if either nation be made a party defendant as aforesaid, and upon each of said ten representative defendants, and shall also be published for a period of four weeks in at least two weekly newspapers having general circulation in the Choctaw and Chickasaw Nations. Such notice shall set forth the nature and prayer of the bill, with the
29 time for answering the same, which shall not be less than thirty days after the last publication. Said suit shall be determined at the earliest practicable time, shall be confined to a final determination of the questions of law here named, and shall be without prejudice to the determination of any charge or claim that the admission of such persons to citizenship or enrollment by said United States courts in the Indian Territory was wrongfully obtained as provided in the next section. In the event said citizenship judgments or decisions are annulled or vacated in the test suit hereinbefore authorized, because of either or both of the irregularities claimed and insisted upon by said nations as aforesaid, then the files, papers and proceedings in any citizenship case in which the judgment or decision is so annulled or vacated, shall, upon written application therefor, made within ninety days thereafter by any party thereto, who is thus deprived of a favorable judgment upon his claimed citizenship, be transferred and certified to said citizenship court by the court having custody and control of such files, papers and proceedings, and upon the filing in such citizenship court of the files, papers and proceedings in any such citizenship case, accompanied by due proof that notice in writing of the transfer and the certification thereof has been given to the Chief Executive officer of each of said nations, said citizenship case shall be docketed in said citizenship court, and such further proceedings shall be had therein in that court as ought to have been had in the court to which the same was taken on appeal from the Commission to the

Five Civilized Tribes, and as if no judgment or decision had
30 been rendered therein.

32. Said citizenship court shall also have appellate jurisdiction over all judgments of the courts in Indian Territory rendered under said Act of Congress of June tenth, eighteen hundred and ninety-six, admitting persons to citizenship or to enrollment as citizens in either of said nations. The right of appeal may be exercised by the said nations jointly or by either of them acting separately at any time within six months after this agreement is finally ratified. In the exercise of such appellate jurisdiction said citizenship court shall be authorized to consider, review, and revise all law, and may, wherever in its judgment substantial justice will thereby be subserved, permit either party to any such appeal to take and present such further evidence as may be necessary to enable said court to determine the very right of the controversy. And said court shall have power to make all needful rules and regulations prescribing the manner of taking and conducting said appeals and of taking additional evidence therein. Such citizenship courts shall also have like appellate jurisdiction and authority over judgments rendered by such courts under the said act denying claims to citizenship or to enrollment as citizens in either of said nations. Such appeals shall be taken within the time hereinbefore specified and shall be taken, conducted and disposed of in the same manner as appeals by the said nations, save that notice of appeals by citizenship claimants shall be served upon the Chief Executive officer of
31 both nations: *Provided*, That Paragraphs thirty-one, thirty-two and thirty-three hereof shall go into effect immediately after the passage of this Act of Congress.

33. A court is hereby created to be known as the Choctaw and Chickasaw Citizenship Court, the existence of which shall terminate upon the final determination of the suits and proceedings named in the last two preceding sections, but in no event later than the thirty-first day of December, nineteen hundred and three. Said Court shall have all authority and power necessary to the hearing and determination of the suits and proceedings so committed to its jurisdiction, including the authority to issue and enforce all requisite writs, process and orders, and to prescribe rules and regulations for the transactions of its business. It shall also have all the powers of a circuit court of the United States in compelling the production of books, papers and documents, the attendance of witnesses, and in punishing contempt. Except where herein otherwise provided, the pleadings, practice and proceedings in said court shall conform, as near as may be, to the pleadings, practice and proceedings in equity causes in the Circuit Courts of the United States. The testimony shall be taken in court or before one of the judges, so far as practicable. Each judge shall be authorized to grant, in vacation or recess, interlocutory orders and to hear and dispose of interlocutory motions not affecting the substantial merits of the case. Said court shall have a chief judge and two associate judges. Said
32 court shall have a seal, shall set at such place or places in the Choctaw and Chickasaw Nations as the judges may desig-

nate, and shall hold public sessions, beginning the first Monday in each month, so far as may be practicable or necessary. The judgment of the citizenship court in any or all of the suits or proceedings so committed to its jurisdiction shall be final.

34. During the ninety days first following the date of the final ratification of this agreement, the Commission to the Five Civilized Tribes may receive applications for enrollment only of persons whose names are on the tribal rolls, but who have not heretofore been enrolled by said Commission, commonly known as "delinquents," and such intermarried white persons as may have married recognized citizens of the Choctaw and Chickasaw Nations in accordance with the tribal laws, customs and usages on or before the date of the passage of this Act of Congress, and such infant children as may have been born to recognized and enrolled citizens on or before the date of the final ratification of this agreement; but the application of no person whomsoever for enrollment shall be received after the expiration of the said ninety days: *Provided*, That nothing in this section shall apply to any person or persons making application for enrollment as Mississippi Choctaws, for whom provision has herein otherwise been made.

35. No person whose names does not appear upon the rolls prepared as herein provided shall be entitled to in any manner participate in the distribution of the common property of the Choc-
33 taw and Chickasaw tribes, and those whose names appear thereon shall participate in the manner set forth in this agreement.

By the act of April 26, 1906, (34 Stat., 137) it was provided:

That after the approval of this act no person shall be enrolled as a citizen or freedman of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes of Indians in the Indian Territory, except as herein otherwise provided, unless application for enrollment was made prior to December first, nineteen hundred and five, and the records in charge of the Commissioner to the Five Civilized Tribes shall be conclusive evidence as to the fact of such application; and no motion to reopen or reconsider any citizenship case, in any of said tribes shall be entertained unless filed with the Commissioner to the Five Civilized Tribes within sixty days after the date of the order or decision sought to be reconsidered except as to decisions made prior to the passage of this act, in which cases such motion shall be made within sixty days after the passage of this act. *Provided*, That the Secretary of the Interior may enroll persons whose names appear upon any of the tribal rolls and for whom the records in charge of the Commissioner to the Five Civilized Tribes show application was made prior to December 1, 1905, and which was not allowed solely because not made within the time prescribed by law. * * * *Provided*, That the rolls of the tribes affected by this act shall be fully completed on or before the fourth day of March, 1907, and the Secretary of the Interior shall have no jurisdiction
34 to approve the enrollment of any person after said date.

As to the Creeks, it was declared the only approved roll should be the Dunn roll of 1867 "except such, if any, as have here-

tofore been enrolled and their enrollment approved by the Secretary of the Interior." Similar provisions follow in Sections 2, 3 and 4 of this Act as to other tribes.

35 PETITIONER'S EXHIBIT A-2.

MUSKOGEE, I. T., *May* 23, 1905.

The Honorable the Secretary of the Interior.

SIR: There is herewith transmitted the record of proceedings in the matter of the application for the enrollment of John E. Goodsby *et al.*, including the decision of this motion dated May 23, 1905, denying the application for the enrollment of Sadie Goodsby as a citizen by intermarriage and granting the application for the enrollment of John E. Goldsby, Linniel E. Goldsby, Bessie and Murray Milton Goldsby as citizens by blood of the Chickasaw Nation.

Respectfully, TAMS BIXBY, *Chairman.*

Approved: November 6, 1905.
E. A. HITCHCOCK, *Secretary.*

36 PETITIONER'S EXHIBIT A-2.

OCTOBER 6, 1905.

Commissioner to the Five Civilized Tribes, Muskogee, Indian Territory.

SIR: May 23, 1905, the Commission to the Five Civilized Tribes returned the record in the matter of the application for the enrollment of John E. Goodsby and his minor children Linniel E., Bessie, and Murray Milton Goldsby, as citizens by blood of the Chickasaw Nation, and for the enrollment of Sadie Goldsby as a citizen by intermarriage of said Nation.

In accordance with the instructions of the Department of April 2, 1905, (I. T. D. 1912) relative to the case of Dr. Clay McCoy, the Commission on May 24, 1905, rescinded its action of September 23, 1904, dismissing the application for the enrollment of these applicants, and held that Sadie Goldsby not having been married according to the laws, customs and usages of the Chickasaw Nation, is not entitled to be enrolled as a citizen by intermarriage of said Nation, and that in accordance with the opinion of the Assistant Attorney-General of March 24, 1905, in the Chickasaw enrollment case of Benjamin J. Vaughan *et al.*, John E. Goldsby, Linniel E. Goldsby, Bessie Goldsby and Murray Milton Goldsby should be enrolled as citizens by blood of the Chickasaw Nation under the provisions of the Acts of Congress approved June 28, 1898 (30 Stat., 495) and July 1, 1902, (32 Stat., 641).

Reporting July 7, 1905, the Indian Office recommended
37 that the Commission's decision be approved. A copy of its letter is enclosed.

The Department concurs in said recommendation and the Commission's decision holding that Sadie Goldsby is not entitled to enrollment as a citizen by intermarriage of the Chickasaw Nation, and that the other applicants therein should be enrolled as citizens of said Nation, is hereby affirmed.

Respectfully,

THOMAS RYAN,
*Acting Secretary.*

38 PETITIONER'S EXHIBIT A-3.

MARCH 2, 1907.

The Honorable Secretary of the Interior.

SIR: Acknowledgment is hereby made of the receipt of Department letter of this date (I. T. D. 6902-1907) enclosing for report copy of letter of February 27, 1907, from the Commissioner to the Five Civilized Tribes relative to the names of persons who have heretofore been placed on the final rolls of citizens by blood of the Choctaw and Chickasaw Nations who are affected by the opinion of the Attorney-General of February 19, 1907.

Commissioner Bixby sets out in his letter the names of all the persons now appearing on the rolls who are deemed by him to be without right to enrollment under the opinion of the Attorney-General mentioned. In some of these cases patents have been executed and recorded and in others no patents have been issued.

The office is of opinion that the list prepared by the Commissioner contains the names of persons who in the light of the opinion of the Attorney-General are not entitled to enrollment and it is therefore recommended that the action of the Commissioner in striking the names of these persons from the rolls be approved and that their names also be stricken from the copies of the rolls in the possession of the Department and of this Office.

Very respectfully,

C. F. LARRABEE,
*Acting Commissioner.*

39 PETITIONER'S EXHIBIT A-3.

DEPARTMENT OF THE INTERIOR.
WASHINGTON, *March* 4, 1907.

I. T. D. 7634-1907.
Direct.

Commissioner to the Five Civilized Tribes, Muskogee, Indian Territory.

SIR: Referring to your letter of August 22, 1906, transmitting a motion for review in the matter of the application for the enrollment of Sadie Goldsby as an intermarried citizen of the Choctaw Nation, you are advised that in view of the opinion of the Attorney-General of February 19, 1907, in the several Choctaw cases submitted to him, including that of William C. Thompson *et al.*, the motion is denied.

The other applicants in the case, including Sadie Goldsby, will be the subject of another letter.

The papers in the case and a carbon copy thereof have been sent to the Indian Office.

Respectfully, E. A. HITCHCOCK, *Secretary.*

9 Inc. to Ind. Of.

40 PETITIONER'S EXHIBIT A-3.

MARCH 4, 1907.

Commissioner of Indian Affairs.

SIR: There is enclosed for your information to be forwarded, Departmental letter to the Commissioner to the Five Civilized Tribes, relative to the striking of certain names from the rolls of citizens by blood of the Choctaw and Chickasaw Nations. A copy of the Commissioner's report in regard to this matter is enclosed for the files of your office.

Respectfully, E. A. HITCHCOCK, *Secretary.*

41 PETITIONER'S EXHIBIT A-3.

DEPARTMENT OF THE INTERIOR,

I. T. D. 7794-1907. WASHINGTON, *March* 4, 1907.

Commissioner to the Five Civilized Tribes, Muskogee, Indian Territory.

SIR: In answer to Department telegram of February 23, 1907, and letter of the same date, you reported in letter of February 27, 1907, after inspection of the partial rolls of the Choctaw and Chickasaw Nations prepared under the Act of June 28, 1898 (30 Stats., 495) and subsequent legislation the persons whose names have been placed on such partial rolls in your opinion, contrary to the views expressed in the Attorney General's opinion of February 19, 1907, in the case of Myrtle Randolph *et al.*, copy of which was transmitted to you with letter of February 23, 1907, and which names you recommend be stricken from the partial rolls opposite the numbers mentioned by you.

Your list is as follows:

*Chickasaws by Blood and Intermarriage.*

* * * * * * *

John E. Goldsby, Linniel E. Goldsby and Bessie Goldsby, opposite Nos. 4984, 4985, 4986, respectively, upon the final roll of citizens by blood of the Chickasaw Nation. All admitted by the Commission in 1896, in case No. 2546; admitted by the United
42 States Court for the Southern District of Indian Territory; no appeal to the Choctaw and Chickasaw citizenship court. Decision of commission of May 23, 1905, granting application affirmed by Department October 6, 1905, (I. T. D. 8148-1905).

* * * * * * *

The Indian Office, to which was referred your letter of the 27th ulto., for report, concurs in letter of March 2, 1907, in your recommendation that such names be stricken from the rolls.

The Department is compelled to reply upon your investigation, as the Act of April 26, 1906 (34 Stat., 137) provides in Section 2 that the rolls of the Choctaw and Chickasaw Nations shall be completed on or before the 4th day of March, 1907, and that the Secretary of the Interior shall have no jurisdiction to approve the enrollment of any persons after such date. Assuming therefore that your information is correct, the names of the persons mentioned not heretofore stricken from the partial rolls were stricken from such rolls this day notwithstanding any decision that may have been made by the Department in favor of such persons.

If, by inadvertence the name of any one has been left on any partial roll after decision adverse to him was made by the Department prior to March 5, 1907, and since the opinion of the Attorney-General referred to, the name of such person will be stricken from the roll as of this date.

A copy of Indian Office letter of March 2, 1907, is enclosed.

Respectfully, E. A. HITCHCOCK, *Secretary.*

43 PETITIONER'S EXHIBIT A-4.

Land.
33598-1907.

DEPARTMENT OF THE INTERIOR.
WASHINGTON, *April* 11, 1907.

Subject:
Demand that names of John E. Goldsby *et al*, be restored to Chickasaw rolls.

Messrs. Kappler & Merillat, Attorneys at Law, Bond Building, Washington, D. C.

SIR: There is enclosed copy of Indian Office letter of the 9th instant regarding your letter of the 6th instant, in which you demand that the Department cause to be erased marks which have been drawn through the names, intending to cancel the enrollment of John E. Goldsby and his three minor children, Linniel E., Bessie, and Murray Milton Goldsby, whose names appeared on the roll as originally made up of the citizens by blood of the Chickasaw Nation, opposite Nos. 4984, 4985, 4986 and 4987, and of Clay McCoy, appearing opposite No. 606 on the roll of intermarried citizens of the Chickasaw Nation as originally made up.

These names were stricken from the rolls under an order of my predecessor on March 4, 1907. The letter of the Office of Indian Affairs fully covers the subject, and you are hereby notified that no action will be taken looking to the reinstatement of the names of the parties whom you represent on the rolls of citizenship of the Chickasaw Nation.

Very respectfully,

JAMES RUDOLPH GARFIELD, *Secretary.*

44

Land.
33598-1907.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, *April* 9, 1907.

Subject:
Demand of Kappler & Merillat that names of clients be restored to Chickasaw roll.

The Honorable the Secretary of the Interior.

SIR: The office has received by Departmental reference, by stamp, letter of the 6th instant from Messrs. Kappler & Merillat, attorneys of this city, in which they say that as attorneys for John E. Goldsby and his three children, Linniel E., Bessie and Murray Milton Goldsby, citizens of the Choctaw (Chickasaw) Nation, enrollment Nos. 4984, 4985, 4986 and 4987, and for Clay McCoy, also an enrolled member of the Chickasaw Nation, they make demand that you cause to be erased marks which have been drawn through the names of their clients on the rolls, and a notation made opposite the names in derogation of the right of such clients to enrollment.

The attorneys say they are advised that without notice to or hearing for their client, after they had been duly enrolled, the Department attempted to strike their names from the roll on some supposed application to their cases of an opinion by Attorney
45 General Bonaparte, to which opinion they were not parties, either directly or indirectly, the opinion having been rendered in the case of some other person. In addition to making the formal demand for the restoration of the names of their clients to the rolls, Messrs. Kappler & Merillat give notice that unless their prayer be promptly granted, they will, for the purpose of protecting the rights of their clients, be compelled to ask the court to issue a writ of mandamus requiring you to restore the names to the rolls.

The names of John E., Linniel E., Bessie and Murray Milton Goldsby appeared opposite Nos. 4984, 4985, 4986 and 4987 respectively on the roll as originally made up of the citizens by blood of the Chickasaw Nation, and the name of Clay McCoy appeared opposite No. 606 on the roll of citizens by intermarriage of the Chickasaw Nation as originally prepared, but they were stricken therefrom under authority of Departmental letter of March 4 (I. T. D. 7794, 6902-1907), wherein the following appears:

Commissioner to the Five Civilized Tribes, Muskogee, Indian Territory.

SIR: In answer to Departmental telegram of February 23, 1907, and letter of the same date, you reported, in letter of February 27, 1907, after inspection of the partial rolls of the Choctaw and Chickasaw nations, prepared under the act of June 28, 1898 (30 Stat., L., 495) and subsequent legislation, the persons whose names have been placed on such partial rolls in your opinion contrary
46 to the views expressed in the Attorney-General's opinion of February 19, 1907, in the case of Myrtie Randolph and

others, copy of which was transmitted to you with letter of February 23, 1907, and which names you recommend be stricken from the partial rolls opposite the numbers mentioned by you.

Your list is as follows:

* * * * * * *

*Chickasaws by Blood and Intermarried.*

* * * * * * *

John E. Goldsby, Linniel E. Goldsby, Bessie Goldsby, opposite Nos. 4984, 4985 and 4986 respectively upon the final roll of citizens by blood of the Chickasaw Nation, all admitted by Commission in 1896 in case No. 254; admitted by [Commission in 1896 in case]* United States Court for Southern District of Indian Territory; no appeal to the Choctaw and Chickasaw Citizenship Court. Decision of Commission of May 23, 1905, granting application, affirmed by Department October 6, 1905 (I. T. D. 8148-1905).

* * * * * * *

Murray Milton Goldsby, opposite No. 4987 upon the final roll of citizens by blood of the Chickasaw Nation; born in 1898 and son of John E. Goldsby, opposite No. 4984. * * *

Clay McCoy, opposite No. 606 upon the final roll of citizens by intermarriage of the Chickasaw Nation, admitted by Com-
47 mission in 1896 in case No. 141; admitted by United States Court for Southern District of Indian Territory; no appeal to the Choctaw and Chickasaw Citizenship Court; directed to be enrolled by Department April 1, 1905 (I. T. D. 3128-1905).

* * * * * * *

The Indian Office, to which was referred your letter of the 27th ultimo, for report, concurs in letter of March 2, 1907, in your recommendation that such names be stricken from the rolls.

The Department is compelled to rely upon your investigation, as the act of April 26, 1906 (34 Stat. L., 137) provides in Section 2 that the rolls of the Choctaw and Chickasaw Nations shall be completed on or before the 4th day of March, 1907, and that the Secretary of the Interior shall have no jurisdiction to approve the enrollment of any person after such date. Assuming, therefore, that your opinion is correct, the names of the persons mentioned, not heretofore stricken from the partial rolls, are stricken from such rolls this day, notwithstanding any decision that may have been made by the Department in favor of such persons.

* * * * * * *

Respectfully, E. A. HITCHCOCK, *Secretary.*

Believing that the Department was acting within the law in applying the principle laid down in the opinion of the Attorney-General of February 19 to all cases having the same history
48 or status and controlled by the same provision of law as were those which were the subject of the opinion of the Attorney-

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[* Words and figures enclosed in brackets erased in copy.]

General, the office is of opinion that Messrs. Kappler & Merillat should be notified that the names of their clients, who are the subject of their communication of the 6th instant, will not be reinstated on the rolls of the citizens of the Chickasaw Nation.

Very respectfully, C. F. LARRABEE,
*Acting Commissioner.*

49 *Rule to Show Cause.*

Filed April 15, 1907.

In the Supreme Court of the District of Columbia.

At Law. No. 49354.

THE UNITED STATES OF AMERICA *ex Rel.* JOHN E. GOLDSBY, Petitioner,
*vs.*
JAMES RUDOLPH GARFIELD, Secretary of the Interior, Respondent.

On consideration of the petition for a writ of mandamus filed herein on the 15th day of April 1907 it is by the Court this 15 day of April 1907 ordered that the respondent show cause on or before the 26th day of April 1907 why the writ of mandamus should not issue as prayed.

WRIGHT, *Justice.*

*Marshal's Return.*

Served copy of within order and copy of the petition in this cause on James R. Garfield Secretary of the Interior personally.
April 15, 1907.

AULICK PALMER, *Marshal,*
S.

50 *Answer and Amendment.*

In the Supreme Court of the District of Columbia.

At Law. No. 49354.

THE UNITED STATES *ex Rel.* JOHN E. GOLDSBY, Petitioner,
*vs.*
JAMES RUDOLPH GARFIELD, Secretary of the Interior, Respondent.

The respondent, for answer to the rule to show cause why a writ of mandamus should not issue against him as prayed in the petition and to said petition, says:

1. That he does not admit that petitioner is a citizen of the United States or a member of the Chickasaw Nation.

2. Respondent admits that he is a citizen of the United States, temporarily residing in the District of Columbia, and that he succeeded Ethan A. Hitchcock as Secretary of the Interior on March 5, 1907.

3. Respondent admits that, under the laws of Congress and the agreements with the Chickasaw Nation, it was the province and duty of his predecessor, as Secretary of the Interior, to take final action upon the applications of persons to be enrolled as members of the Five Civilized Tribes in the Indian Territory, as provided by law, with the exception of such cases as were committed to the jurisdiction of the Citizenship Court by the agreement with the
51 Choctaw and Chickasaw Nations ratified by the Act of Congress of July 1, 1902 (32 Stat., 641), and approve or disapprove the same.

Respondent further says that by the last-named act and agreement (paragraph 24) and the Act of March 3, 1905 (33 Stat. 1048, 1060), exclusive jurisdiction of all matters relating to the allotment of lands in said Tribes, including the making of the rolls of citizenship of said tribes, except as otherwise provided therein, was conferred upon the Secretary of the Interior.

4. Respondent admits that the lands occupied by the Choctaw and Chickasaw Nations in the Indian Territory were granted and secured to them by the treaties referred to in the fourth paragraph of the petition, and the patent issued in pursuance thereof.

5. Respondent admits that said nations have not become extinct or abandoned said lands, but does not admit that petitioner is a member of the Chickasaw Nation, and denies that he has acquired a vested right to any specific tract or allotment of land in said nation, or that he is duly enrolled as a member of said nation upon the rolls prepared by the Commission to the Five Civilized Tribes and the Secretary of the Interior as provided by law, and thereby entitled to a distributive share in the funds and surplus lands of said nation.

6. Respondent admits that provision was made for the enrollment of members of the Five Civilized Tribes in the Indian Territory for the purpose of allotting the lands of said nations in severalty, as set forth in the several acts referred to in the sixth paragraph of the petition.

52 7. Respondent admits that on October 6, 1905, the Acting Secretary of the Interior approved a decision of the Commission to the Five Civilized Tribes, holding that petitioner was entitled to be enrolled as a member by blood of the Chickasaw Nation, and that thereafter his name was placed upon a partial list of members of the Chickasaw Nation prepared by the Commission to the Five Civilized Tribes, which list was on November 27, 1905, approved by Thos. Ryan, First Assistant Secretary of the Interior, as set out in said petition, but avers that thereafter and prior to the time fixed by Congress for the completion of the rolls of members of said nation, the Secretary of the Interior disapproved the enrollment of petitioner and struck his name from said rolls, as set out in paragraph nine of this answer.

8. Respondent admits that a certificate of allotment was issued to petitioner by the Commissioner to the Five Civilized Tribes for certain lands selected by him, but says that the Secretary of the Interior has not approved such allotment and that no patent has been issued or recorded therefor.

9. Respondent says that the name of petitioner was stricken from the partial list of members of the Chickasaw Nation prepared and approved, as aforesaid, by order of his predecessor as Secretary of the Interior on March 4, 1907, prior to the expiration of the time fixed by the act of April 26, 1907 (34 Stat., 137), for the completion of the rolls of said nation, and a notation of such action made and petitioner's name lined out on the copy of said list in his
53 possession on the same day, as appears from the certified copies of the records of the Interior Department marked Exhibits A and B, hereto attached and made a part hereof, and that petitioner's name was lined out upon the other four copies of said list, in pursuance of said order of his predecessor, after March 4, 1907, one of said copies being in the possession of the Commissioner of Indian Affairs and the other three in the possession of the Commissioner to the Five Civilized Tribes.

Respondent further says that the words "328 p. c. 198" after the words "Cancelled March 4 07" on his copy of said list refer to the number and page of the press copy book into which was copied the letter of his predecessor of March 4, 1907, striking the name of petitioner from the rolls.

And respondent avers that the action of his predecessor in striking the name of petitioner from the approved rolls of members of the Chickasaw Nation, as aforesaid, was in accordance with his long established practice, extending from the time the agreement ratified by the act of July 1, 1902 (32 Stat. 641) became operative until March 4, 1907, his predecessor, as the approved rolls of the Five Civilized Tribes in respondent's possession show, having struck several hundred names from said rolls during that time because in his judgment they were improperly enrolled.

Respondent says that there was no rule or regulation requiring the giving of notice in such cases. As to the matter of notice, respondent says that, as he is advised and believes, his predecessor at first exercised the right to strike names from approved lists of members of the Five Civilized Tribes, prior to the time fixed for
54 the completion of the rolls, when in his judgment they were improperly and unlawfully enrolled, without notice to the party concerned, but that for about three years prior to March 4, 1907, the date fixed by the act of Congress of April 26, 1907, for the completion of the rolls, it had been the custom or practice of his predecessor to give notice in such cases and afford the party concerned an opportunity to be heard, but respondent says that, owing to the limited time in which his predecessor had to act before the expiration of the time fixed for completing the rolls, it was impossible to give notice and opportunity to be heard in the case of this petitioner and a large number of other persons whose right to be enrolled was believed by his predecessor to be adversely affected by

the principles announced in an opinion rendered his predecessor by the Attorney General on February 19, 1907, in the case of certain other persons who had been enrolled as members of the Choctaw Nation for allotment purposes, and who were stricken from the rolls by his predecessor in consequence of that opinion.

10. Respondent says that he is not advised as to the value of the lands or moneys claimed by petitioner.

11. Respondent admits that petitioner made demand that respondent restore petitioner to said roll and that he refused so to do.

Further answering, respondent says that by the act of Congress of April 26, 1907 (34 Stat., 137), the rolls of members of the Chickasaw Nation were required to be fully completed on or before March 4, 1907, and the Secretary of the Interior was de-
55 prived of jurisdiction to approve the enrollment of any person after that date.

Further answering, respondent says that petitioner applied in 1896 to the Commissioner to the Five Civilized Tribes to be admitted and enrolled as a citizen of the Chickasaw Nation under the act of June 10, 1896 (29 Stat., 329), and his application was allowed; that the Chickasaw Nation appealed from the judgment of the Commissioner to the United States Court, Southern Division, Indian Territory, which approved the same; that thereafter the judgment of the United States court was annulled by the Citizenship Court in the test suit provided for by the agreement with the Choctaw and Chickasaw Nations ratified by the act of Congress of July 1, 1902 (32 Stat., 641, 646); that petitioner failed to remove his case to the Citizenship Court for final determination as provided by said act; and that thereafter the Commissioner to the Five Civilized Tribes and Secretary of the Interior had no jurisdiction to enroll petitioner.

Respondent further says that the matters sought to be controlled by the petition relate to the allotment of land in severalty in the Chickasaw Nation, and that by the legislation of Congress exclusive jurisdiction of all matters relating to the allotment of lands in severalty in said nation has been conferred upon the Secretary of the Interior.

Respondent further says that the matters sought to be controlled by the petition involve the exercise of judgment and discretion on the part of the Secretary of the Interior.

Wherefore, respondent prays that the rule against him be
56 discharged and the petition dismissed at the cost of petitioner.

JAMES RUDOLPH GARFIELD,
*Secretary of the Interior.*

EDWARD T. SANFORD,
*Assistant Attorney-General.*

WILLIAM R. HARR,
*Special Assistant Attorney-General,*
*For Respondent.*

UNITED STATES OF AMERICA, *District of Columbia, ss:*

James Rudolph Garfield, being duly sworn, deposes and says: That he is the respondent in the above entitled cause; that he has read the foregoing answer and knows the contents thereof, and that the matters therein stated of his own knowledge are true, and those stated on information and belief he believes to be true.

JAMES RUDOLPH GARFIELD.

Subscribed and sworn to before me this 4th day of June 1907.

[SEAL.] EDW'D B. FOX,
*Notary Public, D. C.*

57 EXHIBIT "A."

I. T. D. 7794-1907.
L. R. S.
F. L. C.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *March* 4, 1907.

Y. P.
L. L. B.

Commissioner to the Five Civilized Tribes, Muskogee, Indian Territory.

SIR: In answer to departmental telegram of February 23, 1907, and letter of the same date, you reported in letter of February 27, 1907, after inspection of the partial rolls of the Choctaw and Chickasaw nations, prepared under the act of June 28, 1898 (30 Stat., 495), and subsequent legislation, the persons whose names have been placed on such partial rolls, in your opinion, contrary to the views expressed in the Attorney-General's opinion of February 19, 1907, in the case of Myrtle Randolph and others, copy of which was transmitted to you with letter of February 23, 1907, and which names you recommend be stricken from the partial rolls, opposite the numbers mentioned by you.

Your list is as follows:

* * * * * * *

*Chickasaws by Blood and Intermarriage.*

* * * * * * *

John E. Goldsby, Linniel E. Goldsby and Bessie Goldsby, opposite No. 4984, 4985, and 4986, respectively upon the final
58 roll of citizens by blood of the Chickasaw Nation. All admitted by Commission in 1896 in case No. 254; admitted by United States court for Southern District of Indian Territory; no appeal to the Choctaw and Chickasaw Citizenship Court. Decision of Commission of May 23, 1905, granting application affirmed by Department October 6, 1905 (I. T. D. 8148-1905).

* * * * * * *

The Indian Office, to which was referred your letter of the 27th ultimo for report, concurs in letter of March 2, 1907, in your recommendation that such names be stricken from the rolls.

The Department is compelled to rely upon your investigation, as the act of April 26, 1906 (34 Stat. 137), provides in section 2 that the rolls of the Choctaw and Chickasaw nations shall be completed on or before the 4th day of March, 1907, and that the Secretary of the Interior shall have no jurisdiction to approve the enrollment of any person after such date. Assuming, therefore, that your information is correct, the names of the persons mentioned, not heretofore stricken from the partial rolls, are stricken from such rolls this day, notwithstanding any decision that may have been made by the Department in favor of such persons.

* * * * * * *

If by inadvertence the name of anyone has been left on any partial roll after decision adverse to him was made by the Department prior to March 5, 1907, and since the opinion of the Attorney-General referred to, the name of such person will be stricken from the roll as of this date.

A copy of Indian Office letter of March 2, 1907, is inclosed.

Respectfully,

(Signed) E. A. HITCHCOCK, *Secretary.*

1 inclosure.

59 EXHIBIT "B."

*Chickasaw Roll—Citizens by Blood.*

| No. | Name. | Age. | Sex. | Blood. | Census card No. |
|---|---|---|---|---|---|
| * * * * * | | * | * | * | * |
| * * * * * | | * | * | * | * |
| Canceled March 4/07, 328 p. c. 198. | | | | | |
| [4984 | Goldsby, John E..... | 44 | M. | 1/32 | 1697]* |
| Canceled March 4/07, 328 p. c. 198. | | | | | |
| [4985 | Goldsby, Linniel E..... | 16 | M. | 1/64 | 1697]* |
| Canceled March 4/07, 328 p. c. 198. | | | | | |
| [4986 | Goldsby, Bessie ..... | 13 | F. | 1/64 | 1697]* |
| Canceled March 4/07, 328 p. c. 198. | | | | | |
| [4987 | Goldsby, Murray Milton ..... | 4 | M. | 1/64 | 1697]* |
| * * * * * | | * | * | * | * |
| * * * * * | | * | * | * | * |
| * * * * * | | * | * | * | * |

Department of the Interior,
Washington, D. C., Nov. 27, 1905.

Approved:
THOS. RYAN,
*First Assistant Secretary.*
L. R. S.

[*Words and figures enclosed in brackets erased in copy.]

60 *Demurrer.*

Filed June 6, 1907.

In the Supreme Court of the District of Columbia.

At Law. No. 49354.

THE UNITED STATES *ex Rel.* JOHN E. GOLDSBY, Petitioner,
*vs.*
JAMES RUDOLPH GARFIELD, Secretary of the Interior, Respondent.

The petitioner says that the answer filed by respondent in the above entitled cause is bad in substance.

JAMES K. JONES,
KAPPLER & MERILLAT,
*Attorneys for Petitioner.*

*Note.*

One matter to be argued on demurrer is that the answer sets forth no sufficient reason in law for the cancellation by the Secretary of the Interior without notice of the enrollment of petitioner duly and regularly ordered.

*Opinion.*

I am unable to escape the conclusion, that even were it conceded that the Sec'y had authority to strike names from the rolls, nevertheless notice and opportunity to be heard were preliminaries
61 essential to the exercise of the power.

The demurrer to the answer is therefore sustained.

WRIGHT.

Supreme Court of the District of Columbia.

SATURDAY, *July* 20, 1907.

Session resumed pursuant to adjournment, Mr. Justice Anderson presiding.

* * * * * * *

By Justice Wright.

At Law. No. 49354.

THE UNITED STATES *ex Rel.* JOHN E. GOLDSBY, Petitioner,
*vs.*
JAMES RUDOLPH GARFIELD, Secretary of the Interior, Respondent.

Upon hearing the petitioner's demurrer to the answer of the respondent, it is considered that said demurrer be and the same is hereby sustained.

62 *Order for Mandamus to Issue & Appeal Noted.*

Filed August 2, 1907.

In the Supreme Court of the District of Columbia.

Law. No. 49354.

THE UNITED STATES OF AMERICA *ex Rel.* JOHN E. GOLDSBY, Petitioner,
*vs.*
JAMES RUDOLPH GARFIELD, Secretary of the Interior, Respondent.

Come now here as well the Relator, as the Respondent, by their respective attorneys; whereupon the Relator's demurrer to the answer of the Respondent having been sustained on the 20th day of July, 1907, the Respondent by his attorneys says he will stand upon his answer.

Thereupon, the Court being fully advised, it is considered, ordered and adjudged that the Respondent James Rudolph Garfield, be, and he is hereby commanded within twenty days after this date to restore the name of the Relator to the rolls of members or citizens of the Chickasaw Tribe or Nation, to erase from said rolls the statements placed thereon derogatory to Relator's rights in said tribe of said Chickasaw Tribe and to recognize Relator as an enrolled member of said tribe.

The Respondent thereupon in open Court by counsel excepted to the judgment so rendered and prayed an appeal from the judgment of this Court to the Court of Appeals of the District of Co-
63 lumbia, which was allowed, and pending such appeal the judgment is stayed and no writ shall issue thereon against the Respondent.

JOB BARNARD, *Justice.*

*Directions to Clerk for Preparation of Transcript of Record.*

Filed August 2, 1907.

In the Supreme Court of the District of Columbia.

At Law. No. 49354.

THE UNITED STATES *ex Rel.* JOHN E. GOLDSBY, Petitioner,
*vs.*
JAMES RUDOLPH GARFIELD, Secretary of the Interior.

In preparing the transcript of the record in this case for the Court of Appeals the Clerk will please copy:

1. Petition, Exhibits and rule to show cause.
2. Answer, inserting amendment to paragraph nine at end of that paragraph, and omitting all orders in regard to amendments.

3. Demurrer to answer.
4. Order sustaining demurrer.
5. Judgment and supersedeas order.

WILLIAM R. HARR,
*Special Assistant to the Attorney General,*
*Attorney for Respondent.*
KAPPLER & MERILLAT,
*Attorneys for Relator.*

64 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia:*

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 63, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 49354, at Law, wherein The United States of America, *ex relatione* John E. Goldsby, is Petitioner, and James Rudolph Garfield, Secretary of the Interior, is Respondent, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the city of Washington, in said District, this 16th day of September, A. D. 1907.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1829. James Rudolph Garfield, Secretary of the Interior, appellant, *vs.* The United States of America, *ex relatione* John E. Goldsby. Court of Appeals, District of Columbia. Filed Sep. 17, 1907. Henry W. Hodges, clerk.

33 WEDNESDAY, *November 6th, A. D. 1907.*

JAMES RUDOLPH GARFIELD, SECRETARY of the Interior, Appellant,
*vs.*
THE UNITED STATES OF AMERICA, EX relatione John E. Goldsby. } No. 1829

JAMES RUDOLPH GARFIELD, SECRETARY of the Interior, Appellant,
*vs.*
THE UNITED STATES OF AMERICA EX rel. Ida Allison } No. 1838

and

JAMES RUDOLPH GARFIELD, SECRETARY of the Interior, Appellant,
*vs.*
THE UNITED STATES OF AMERICA, EX rel. George A. Allison. } No. 1839.

The argument in the above-entitled causes was commenced by Mr. Edward T. Sanford, attorney for the appellant, and was continued by Mr. C. H. Merillat, attorney for the appellees, and was concluded by Mr. Wm. R. Harr, attorney for the appellant.

34 In the Court of Appeals of the District of Columbia.

JAMES RUDOLPH GARFIELD, SECRETARY of the Interior, Appellant,
*vs.*
THE UNITED STATES OF AMERICA, EX rel. John E. Goldsby, Appellee. } No. 1829

JAMES RUDOLPH GARFIELD, SECRETARY of the Interior, Appellant,
*vs.*
THE UNITED STATES OF AMERICA, EX rel. Ida B. Allison, Appellee } No. 1838

JAMES RUDOLPH GARFIELD, SECRETARY of the Interior, Appellant,
*vs.*
THE UNITED STATES OF AMERICA, EX rel. George A. Allison, Appellee. } No. 1839.

*Stipulation.*

It is hereby stipulated between the parties hereto that these causes are submitted on the printed record and briefs and the argument heretofore made to the justices who sat in the above-entitled causes, exclusive of the late Associate Justice McComas, namely, Mr. Chief Justice Shepard and Mr. Justice Barnard, provided, however, that if the remaining justices shall be divided in opinion, the several causes shall not be affirmed by a divided court, but shall be assigned for reargument.

EDWARD T. SANFORD,
*Asst. Atty Gen.*
WILLIAM R. HARR,
*Attorneys for Appellant.*
KAPPLER & MERILLAT,
Per CHAS. H. MERILLAT,
*Attorneys for Appellees.*

35 (Endorsed:) Nos. 1829, 1838 & 1839. Garfield *v.* U. S. ex rel., Goldsby; Garfield *v.* U. S. ex rel., Allison; Garfield *v.* U. S. ex rel Allison. Stipulation to submit case on records and briefs to the chief justice and Justice Barnard. Court of Appeals, District of Columbia, filed Nov. 19, 1907. Henry W. Hodges, clerk.

36 JAMES RUDOLPH GARFIELD, SECRETARY OF the Interior, Appellant,
*vs.*
THE UNITED STATES OF AMERICA, EX RELATIONE John E. Goldsby. | No. 1829.

*Opinion.*

Mr. Chief Justice Shepard delivered the opinion of the court:

This is an appeal from an order of the Supreme Court of the District of Columbia granting a writ of mandamus to compel the appellant to erase certain marks upon the approved rolls of members of the Chickasaw Nation, striking the name of relator therefrom; and to restore the name of relator to said roll.

There is no controversy in respect of the facts involved. Prior to October 26, 1905, the Commission to the Five Civilized Tribes certified to the Secretary of the Interior a list of the names of persons that had been to that date enrolled as entitled to membership of the Chickasaw Nation, for the purpose of the allotment of lands and the distribution of tribal funds, under the provisions of the acts of Congress providing therefor. On October 6, 1905, the Secretary of the Interior affirmed the act of the Commission enrolling the relator, and on April 26, 1906, reported his approval to the Commission. The roll, as approved, was kept in the Secretary's office and copies sent as directed by the law. Thereafter relator selected land and was awarded a certificate of allotment by said Commission; but no patent has been issued. On March 4, 1907, the Secretary of the Interior,

without notice to, or knowledge of, the relator at the time, erased the name of relator from the said roll, in his office, and caused an entry to be made opposite his name, as follows: "Cancelled March 4, 1907." No erasure was made on the duplicate copies. Upon learning this fact, on April 6, 1907, the relator made a demand upon the Secretary that he should erase, or cause to be erased, the line that had been drawn across the entry of his enrollment, as well as the entry of cancellation aforesaid. The erasure had been made by order of Secretary Hitchcock, and the demand was made upon his successor, the appellant, who found the roll in the condition mentioned, upon his assumption of the office of Secretary of the Interior. The Secretary claims exclusive jurisdiction in the matter of making and approving the tribal rolls and allotments thereunder, and the power thereunder to recall his former approvals of membership enrollments up to and including March 4, 1907, the day fixed for the final closing of enrollment. The answer of appellant shows that his predecessor had stricken many names from the approved rolls from time to time, and stated that there was no regulation requiring the giving of notice in such cases. He further says that he is advised that his predecessor for a time exercised his right to strike names from the rolls without notice, but that about three years before March 4, 1907, he had followed the practice of giving notice to parties, and affording them an opportunity to be heard; but that on account of the fact that the final completion of the rolls could not be delayed beyond the date fixed by law therefor, namely, March 4, 1907, no such notice could be given to the relator. Without reciting the many acts of Congress relating to the Five Civilized Tribes, it is sufficient to say that the act of March 3, 1893, creating the "Dawes Commission," contemplated the ultimate creation of a State or States which should embrace the lands within the Indian Territory, where the tribes aforesaid were then living. From that time on, various statutes were enacted providing for the enrollment of the actual members of the several tribes and the allotment of their lands to enrolled members in severalty, as well as the distribution among members of accumulated and accumulating tribal funds. The act of June 10, 1896, directed the "Dawes Commission"—whose official designation was the "Commission to the Five Civilized Tribes"—to make up a complete roll of members of the several nations; and as a part thereof confirmed the rolls of citizenship of the several tribes then existing. Persons whose names were not upon said rolls were authorized to make application for enrollment. If either such applicant or the tribe should be aggrieved by a decision entering such applicant upon the roll, an appeal was authorized to be taken within sixty days to the United States Court in the Territory, whose judgment therein was declared final. The complete rolls as made up by the Commission were to be lodged with the Commissioner of Indian Affairs
37 after six months, to remain for use as the final judgment of the duly constituted authorities. The Dawes Commission, it seems, did not adopt the former tribal rolls without question, but proceeded to try the rights of persons thereon, and much litigation

followed. The act of June 7, 1897, declared that the rolls confirmed meant the last authenticated rolls of each tribe that had been approved by the council of the several nations, and the descendants of those appearing on such rolls, with such additional names as may have been added either by the councils, the courts or the Dawes Commission under the act of June 10, 1896. The Commission was given the right to investigate all other names, and after notice and opportunity to be heard, to strike them from the rolls, with right of appeal to the United States court. All matters relating to the tribes were again provided for by the "Curtis Act" of June 28, 1898, which is comprehensive and sweeping in its character. This reduced the confirmed rolls, and directed the Dawes Commission to investigate all other rolls and omit any persons placed thereon by fraud or without authority of law. It was directed to make correct rolls which, when approved by the Secretary of the Interior, shall be final, and such persons shall alone constitute the several tribes represented. Acts of May 31, 1900, and March 3, 1901, made some further provisions, not important to be mentioned, and the last act directed the Secretary to fix a time for closing the enrollment. A later act (April 26, 1906) provided that the rolls of the tribes shall be fully completed on or before March 4, 1907, and the Secretary shall have no jurisdiction to approve the enrollment of any person after that date. 33 Stat., 137. The act of July 1, 1902 (32 Stat., 641), ratifying an agreement between the United States and the Choctaw and Chickasaw nations (of which the relator claims membership), provided that the enrollment of their members should be made in strict compliance with the provisions of the acts of June 28, 1898, and May 31, 1900, and that no person claiming right to enrollment by virtue of a judgment of a United States court, and whose right may be contested by proceedings under this agreement, shall be enrolled until his right has been finally determined. Section 30 of the agreement as recited in the act aforesaid reads as follows:

"30. For the purpose of expediting the enrollment of the Choctaw and Chickasaw citizens and the Choctaw and Chickasaw freedmen, the said Commission shall, from time to time, and as early as practicable, forward to the Secretary of the Interior lists upon which shall be placed names of those persons found by the Commission to be entitled to enrollment. The lists thus prepared, when approved by the Secretary of the Interior, shall constitute a part and parcel of the final rolls of citizens of the Choctaw and Chickasaw tribes and of Choctaw and Chickasaw freedmen, upon which allotment of land and distribution of other tribal property shall be made as herein provided. Lists shall be made up and forwarded when contests of whatever character shall have been determined, and when there shall have been submitted to and approved by the Secretary of the Interior lists embracing names of all those lawfully entitled to enrollment the rolls shall be deemed complete. The rolls so prepared shall be made in quintuplicate, one to be deposited with the Secretary of the Interior, one with the Commissioner of Indian Affairs, one with the principal

chief of the Choctaw Nation, one with the governor of the Chickasaw Nation, and one to remain with the Commission to the Five Civilized Tribes."

Whether the relator's name appeared upon the original tribal roll or was added thereto upon application does not appear; but it is admitted that he was duly and finally enrolled as a member by the Dawes Commission, and his name certified to the Secretary upon one of the lists or parts of the roll sent up under the section aforesaid. No objection appears to have been made to his right to membership and his enrollment was regularly and formally approved and notice thereof given to the commission. Acting upon this as final, the Commission issued relator's certificate of allotment. Section 23 of the act of July 1, 1902 (32 Stat., 641), made this certificate conclusive evidence of the allottee's right to the land described therein.

By virtue of his enrollment the relator became entitled to share in the distribution of the tribal funds, also provided for in the statutes, which has not yet been made in full. It is conceded that in addition to issuing certificates of allotment upon the lists or partial rolls returned by the Secretary as approved, it has been the practice of the Indian agents charged with that duty to distribute part of such funds to such approved members, and in this, or one of the other cases submitted with it, it was admitted that the enrolled member whose name has been erased from the Secretary's copy of the rolls was allowed to participate in one of these partial distributions of the fund.

We consider it unnecessary to review the cases cited on the argument relating to the plenary power of Congress over the lands of the Indians and their allotment, and to the comprehensive powers conferred upon the Secretary of the Interior in regard to all matters of administration relating to the same subjects. It is sufficient to say that we recognize to the fullest extent this power of Congress as well as those intrusted to the Secretary of the Interior, and concede that in the performance of the onerous duties confided to the discretion of the Secretary, his decisions are not subject to judicial review. One of the most important and onerous of those duties was that of examining the lists of rolls of membership of these five large tribes, when reported to him as finally determined by the Commission. In its performance he could disapprove and strike names from the list and approve others. No court was vested with the power by appeal or otherwise to review his decisions in either case.

It is equally well settled on the other hand that when the judgment or discretion of an executive officer has been completely exercised in the performance of a specific duty, the act performed is beyond his review or recall unless power to that extent has also been conferred upon him. West *v.* Hitchcock, 19 App. D. C., 333, 345; U. S.
38 *v.* Schurz, 102 U. S., 378; Butterworth *v.* Hoe, 112 U. S. 50; Garfield *v.* U. S. ex rel. Frost, present term.

It remains to consider whether the Secretary's discretion had been completely exercised, and his power exhausted when he gave his approval to the relator's enrollment, and reported that approval to

the Commission as shown in this case. The determination of this question depends upon the meaning of section 30 of the act July 1, 1902, heretofore set out. It was well known to Congress that the tribes were composed of thousands of undoubted members, and that many others, perhaps thousands, claimed membership. It was known, when the first act looking to allotment of these lands was enacted, that the ascertainment of the true membership of these tribes would require time and be attended with contests. Before the enactment of the act of July 1, 1902, experience had demonstrated the justice of this apprehension; and, thereafter, as we have seen, the time of final completion of the rolls of membership had to be extended until March 4, 1907. Necessarily, the Commission charged with the duty, in the first instance, of preparing the rolls, would have to consider one by one the names of applicants when the facts of their cases were prepared for determination. For the purpose of expediting this enrollment, as the statute declares, the Commission was not directed to complete the work as a whole, but "from time to time and as early as practicable, forward to the Secretary of the Interior lists upon which shall be placed the names of all persons found by the Commission to be entitled to enrollment." And it is further provided that "the lists thus prepared, when approved by the Secretary of the Interior, shall constitute a part and parcel of the final rolls of citizens of the Choctaw and Chickasaw tribes and of Choctaw and Chickasaw freedmen, upon which allotment of land and distribution of other tribal property shall be made as herein provided." It is admitted that there was no question but that the lands were ample to satisfy all probable claims to the extent provided for each individual allotment, and that there was no danger of exhaustion of the funds which were to be distributed in part to each member then or thereafter to be enrolled. These facts were of course well known to the parties entering into the agreement, and to Congress when that agreement was embodied in the statute. The contention of the relator is that each roll so approved became final under the terms of the law without waiting for the date fixed until the final closing of the enrollment. That this was the construction given to the section by the Secretary of the Interior, is evidenced by the fact that he certified his approval of the sections of the rolls from time to time submitted, sometimes striking therefrom the name of a person whose enrollment he disapproved. A copy of the list was retained by him, and others delivered to the Commission, to the Commissioner of Indian Affairs, and to the chiefs of the two nations. Upon these approved lists the Commission proceeded to make allotments, and the Indian agents distributed a portion of the funds in hand. These agents were under the control of the Secretary of the Interior. Many of these allotments passed to patents which were delivered with the approval of the Secretary. On March 4, 1907, the day on which all authority to enroll members ended, the then Secretary, who shortly thereafter resigned his office, undertook to cancel approvals that had been made, by erasing relator's name, with others, from the approved list remaining in his custody.

The contention for the authority to do this is founded upon a succeeding paragraph of the section which reads as follows: "Lists shall be made up and forwarded when contests of whatever character shall have been determined, and when there shall have been submitted to and approved by the Secretary of the Interior lists embracing names of all those lawfully entitled to enrollment, the rolls shall be deemed complete."

We think that the Secretary's first construction of the entire section—which must be considered as a whole to arrive at its meaning—was the correct one. Especially when we take into consideration the conditions before stated, the plain intention of the framers of the agreement and of Congress seems to have been that this final roll, to be completed and ended on or before March 4, 1907, should be made up and approved in section for convenience and dispatch. By this means only could sufficient time and opportunity be given each claimant for the assertion of his rights, either before the Commission or the Secretary. We can not conceive that either the contracting parties or Congress contemplated a power in the Secretary, after having approved the rolls in sections from time to time, to strike down the whole list of enrollment, or erase any number of names therefrom on the last day within which any enrollment could be made, by him or any other authority. Action of this kind could only be taken, as it was, without notice to a party whose rights, or expectations, if they are to be called such only, were thus attempted to be destroyed.

It is quite true that individual members of the Indian tribes had no vested rights in the lands by virtue of enrollment only, and that their allotment was entirely within the unlimited powers of Congress, yet these powers had been exercised only after a solemn agreement with the tribes. And even if the individual, after his enrollment had been approved, had nothing more than a mere expectancy, that expectancy represented something of considerable pecuniary value; and the power to destroy that reasonable expectancy without notice and opportunity to defend it is so opposed to the genius of our institutions that it ought not to be inferred to exist. Nothing less than the plain provision of an imperative law would seem to warrant it.

The appellant relies further upon the act of April 26, 1906 (33 Stat., 137), as conferring, by implication, the power to the Secretary of the Interior to strike the name of the relator from the roll after approval. Section 2 of this act, as before stated, requires that the rolls shall be fully completed on or before March 4, 1907, and prohibits the Secretary from approving the enrollment of any person after said date. Section 4 permits the transfer, under certain conditions, of a person from the approved roll of freedmen to that of
39 citizens by blood. Section 5 provides that all patents to allottees shall be recorded in the office of the commissioner, "and when so recorded shall convey legal title, and shall be delivered under the direction of the Secretary of the Interior to the party entitled to receive the same." Section 6 provides for the removal, by the President, of principal chiefs of the nations, who shall refuse or neglect to

perform the duties imposed upon them. Their duty under the former statute was to execute patents to allottees holding certificates from the Commission. The same section also provides in case of the failure of said chiefs to execute a patent for thirty days after notice that the same is ready for signature, that such patent may be approved by the Secretary without such execution, and when so approved and recorded shall convey legal title.

We see nothing in this statute enlarging the powers of the Secretary, save under the conditions expressly provided for. The power given to transfer a freedman to the citizenship roll is limited thereto. The transfer, which increases his allotment, is for his advantage, and does not infringe the legal rights of other members. This power to add names, under certain conditions, does not include the power to strike a name from the citizenship roll. The strictly limited power of transfer from the freedman's roll to that of citizenship by blood, before March 4, 1907, does not confer the power to cancel the approval of the latter roll previously given. The natural inference is against the exercise of the further power.

Entertaining the opinion that the Secretary had no power to cancel his approval and remove relator's name from the roll at the time and in the manner stated, the further question is presented: Is it within the judicial power to compel him to undo his action by removing his entry of cancellation and restoring the name to the roll?

Conceding that mandamus will not ordinarily lie to compel the undoing of an act, it is clear that the doctrine has some necessary limitations. In the first place it has not been suggested, nor can we perceive, that there is any other legal remedy for the relief of the relator from the consequences of the injury that has been done him. A cloud has been cast upon his right to the land allotted to him that will prevent his obtaining his patent, and his right to share in the distribution of the tribal funds, dependent upon his recognized enrollment, has been impeded if not finally destroyed. These conditions have been brought about solely by the failure and refusal of the Secretary to give effect to, and enforcement of, his former decision that has been held to be final and beyond the power of review or recall. Unless the writ of mandamus can be issued the mischief is wholly without judicial remedy. That it will issue in such a case as here presented, to undo an unlawful act and restore a former condition, is, in our opinion, well settled. Stafford *v.* Union Bank, 17 How., 275, 282; Ex parte Dubuque & Pacific R. R., 1 Wall., 69, 73; U. S. ex rel. Romero *v.* Cortelyou, 26 App. D. C., 298, 301; U. S. ex rel. Daly *v.* McFarland, 28 App. D. C., 552.

In Stafford *v.* Union Bank, supra, the United States Court for the District of Texas had rendered a decree for the payment of money and the judge had thereafter granted an appeal with supersedeas upon wholly inadequate bond. Having heard that this bond did not have the legal effect to supersede the execution of the decree, the court issued an order compelling the judge to carry the decree into effect. See also, Stafford *v.* New Orleans Canal and Banking Co., 17

How., 283. In the Dubuque and Pacific R. R. case the Supreme Court had reversed a judgment of the District Court of Iowa and directed a judgment for the defendant. Upon return of the mandate a judgment was entered in accordance therewith. Thereafter the court, upon the affidavits of ability to show new facts, granted a new trial. The judge was compelled by mandamus to erase and vacate the order granting the new trial, and execute the judgment. In U. S. ex rel. Romero *v.* Cortelyou, supra, the Postmaster-General was compelled to reestablish a post-office that had been abolished. In U. S. ex rel. Daly *v.* McFarland, the Commissioners of the District of Columbia were ordered to vacate the revocation of a plumber's license and restore his status. The facts of this case bring it under the principle governing those cases, and the one last cited is directly in point.

We are of the opinion that the court was right in ordering the appellant to erase the entries upon the roll and restore relator's name thereto; and the judgment must, therefore, be affirmed with costs. It is so ordered.

Affirmed.

40 FRIDAY, *November 29th, A. D., 1907.*

| | |
|---|---|
| JAMES RUDOLPH GARFIELD, SECRETARY of the Interior, Appellant. *vs.* THE UNITED STATES OF AMERICA, ex relatione, John E. Goldsby. | No. 1829. October term 1907. |

Appeal from the Supreme Court of the District of Columbia. This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said Supreme Court in this cause be, and the same is hereby, affirmed with costs.

Per Mr. Chief Justice SHEPARD.

November 29, 1907.

41 MONDAY, *January 6th, A. D., 1908.*

| | |
|---|---|
| JAMES RUDOLPH GARFIELD, SECRETARY of the Interior, Appellant. *vs.* THE UNITED STATES OF AMERICA, ex relatione John E. Goldsby. | No. 1829. |

On motion of Mr. W. R. Harr, of counsel for the appellant, it is ordered by the court that a writ of error to remove this cause to the Supreme Court of the United States issue. And it is further ordered that the mandate in said cause be, and the same is hereby, stayed until further order.

42 UNITED STATES OF AMERICA, *ss:*

*The President of the United States, to the honorable the justices of the Court of Appeals of the District of Columbia, greeting:*

BECAUSE in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between James Rudolph Garfield, Secretary of the Interior, Appellant, and The United States of America ex relatione John E. Goodsby, Appellee, a manifest error hath happened, to the great damage of the said appellant as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the honorable Melville W. Fuller, Chief Justice of the United States, the 6th day of January, in the year of our Lord one thousand nine hundred and eight.

[SEAL.] HENRY W. HODGES,
*Clerk of the Court of Appeals of the District of Columbia.*

Allowed by

———— ————

43 UNITED STATES OF AMERICA, *ss:*

*To the United States of America, ex relatione, John E. Goldsby greeting:*

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein James Rudolph Garfield, Secretary of the Interior is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard, Chief Justice of the Court of Appeals of the District of Columbia, this 6th day of January, in the year of our Lord one thousand nine hundred and eight.

SETH SHEPARD,
*Chief Justice of the Court of Appeals of the District of Columbia.*

Service accepted this 6th day of January, A. D. 1908.

CHARLES H. MERILLAT.

44 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 43, inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of James Rudolph Garfield, Secretary of the Interior, Appellant, vs. The United States of America, ex relatione John E. Goldsby No. 1829, January term, 1908, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 11th day of January, A. D. 1908.

[SEAL.] HENRY W. HODGES,
*Clerk of the Court of Appeals of the District of Columbia.*

(Indorsement on cover:) File No. 20,975. District of Columbia, Court of Appeals. Term No. 572. James Rudolph Garfield, Secretary of the Interior, Plaintiff in Error, *vs.* The United States of America ex relatione John E. Goldsby. Filed January 17th, 1908 File No. 20,975.

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# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908

No. 249.

JAMES RUDOLPH GARFIELD, SECRETARY OF THE INTERIOR, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA, EX REL. IDA ALLISON.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED JANUARY 27, 1908.

(20976.)

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1907.

## No. 573.

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JAMES RUDOLPH GARFIELD, SECRETARY OF THE INTERIOR, PLAINTIFF IN ERROR.

vs.

THE UNITED STATES OF AMERICA, EX REL. IDA ALLISON.

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IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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# In the Court of Appeals of the District of Columbia.

No. 1838.

JAMES RUDOLPH GARFIELD, Secretary of the Interior, Appellant,
*vs.*
THE UNITED STATES OF AMERICA *ex Rel.* IDA ALLISON.

*a* Supreme Court of the District of Columbia.

At Law. No. 49433.

THE UNITED STATES OF AMERICA *ex Relatione* IDA ALLISON, Petitioner,
*vs.*
JAMES RUDOLPH GARFIELD, Secretary of the Interior, Respondent.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Petition for Writ of Mandamus.*

Filed May 10, 1907.

In the Supreme Court of the District of Columbia.

At Law. No. 49433.

THE UNITED STATES OF AMERICA *ex Relatione* IDA ALLISON, Petitioner,
*vs.*
JAMES RUDOLPH GARFIELD, Secretary of the Interior, Respondent.

Mandamus.

Your petitioner respectfully represents:

1. That she is a citizen of the United States and a citizen, member and resident of the Cherokee Nation in the Indian Territory, and a Cherokee Indian by blood.

2. That the respondent, James Rudolph Garfield, is a citizen of the United States, temporarily residing in the District of Columbia, and is an officer of the Government of the United States and Secretary of the Interior in said Government and is sued as such, having succeeded on March 5, 1907, as said Secretary of the Interior the Ethan A. Hitchcock, hereinafter mentioned.

3. That, as heretofore stated, respondent's immediate predecessor in office as Secretary of the Interior was Ethan A. Hitchcock, to whom as said Secretary of the Interior was committed by Congress under certain laws hereinafter referred to the duty of final action on applications for citizenship in the Five Civilized Tribes in the Indian Territory and of approving the enrollment of those applicants whom he should deem entitled to be placed on the
2 final rolls of members or citizens of any one of the Five Civilized Tribes or Nations, the Cherokee tribe or Nation being one of the said Five Civilized Tribes.

4. That by certain treaties and agreements between the United States and the Cherokee Nation of Indians the Cherokee Nation ceded to the United States the lands guaranteed to it by treaties with the United States east of their present home in exchange for the lands whereon said nation now resides and by Article I of the treaty between the United States and the Cherokee Nation proclaimed August 17, 1846, (9 Stats. at Large) the lands whereon said Cherokee Nation now resides and in which lands your petitioner has been given an allotment as her share of the lands of her tribe or nation were ceded by the United States to the Cherokee Nation in fee simple, said Article I being as follows:

"Article I. That the lands now occupied by the Cherokee Nation shall be secured to the whole Cherokee people for their common use and benefit; and a patent shall be issued for the same, including the eight hundred thousand acres purchased, together with the outlet west, promised by the United States, in conformity with the provisions relating thereto, containing in the third article of the treaty of 1835, and in the third section of the act of Congress, approved May twenty-eighth, 1830, which authorizes the President of the United States, in making exchanges of lands with the Indian tribes, "to assure the tribe or nation with which the exchange is made, that the United States will forever secure and guarantee to them, and their heirs or successors, the country so exchanged with them; and if they prefer it, that the United States will cause a patent or grant to be made and executed to them for the same: *Provided, always,* That such lands shall revert to the United States if the Indians become extinct or abandon the same."

5. That said Indians and their heirs have not become extinct and have not abandoned the said land or any part thereof; that the reversionary interest of the United States in said lands has
3 been otherwise terminated and surrendered to said Indians by the Acts of Congress, treaties and agreements herein mentioned; that your petitioner is and likewise has been long recognized by the Cherokee Nation as a Cherokee citizen or member of said tribe by blood; that your petitioner as one of the heirs of the Indians

referred to in the said treaty proclaimed in 1846 was entitled prior to allotment as hereinafter mentioned to an equal undivided interest in the whole of the lands of the Cherokee Nation after certain lands were duly and lawfully reserved for town site, charitable and certain specified purposes in accordance with Acts of Congress and agreements duly entered into and approved and ratified by the nations, parties thereto, between the United States and the Cherokee Nation; and is now the owner of and is possessed in vested right of a lawful allotment of land in the Cherokee Nation and is further entitled to an equal, undivided distributive share in the funds and surplus lands of the Cherokee Nation after allotments, as hereinafter referred to, are made to all the duly enrolled members of the Cherokee Nation.

6. That under the provisions of various acts of Congress a Commission to the Five Civilized Tribes was created for the purpose, among other things, of making agreements with each of the Five Civilized Tribes for the division in severalty among their citizens or members of the lands held by them in common, of enrolling under the direction and approval of the Secretary of the Interior the members or citizens of each and every one of the Five Civilized Tribes and of allotting in severalty in fee simple to the members of the Cherokee Nation the lands held by said nation as above set
4 forth. That under the provisions of said Acts of Congress, of agreements effected in accordance therewith, and of treaties between the United States and said Indian tribes rolls of members of each of the tribes were directed to be prepared by said Commission under the supervision of the Secretary of the Interior from time to time and it was provided that when the enrollment of any person as a member of any one of the Five Civilized Tribes should be approved by the Secretary of the Interior his name should be placed on the final roll of said tribe, and he thereby should become and be a member of the said tribe or nation and entitled to an allotment, in the Cherokee Nation, of 120 acres of average allottable land in said nation, and to the other rights and privileges common to citizens of said nation.

That by the Act of June 10, 1896, (29 Stat., 321, 329) it was provided:

"that the rolls of citizenship of the several tribes as now existing are hereby confirmed"

and that either the Commission to the Five Civilized Tribes or the legally constituted court or committee on citizenship of the several tribes should determine, after hearing, the applications of persons claiming right to be admitted and enrolled in the several nations, either the tribe or any person aggrieved by any decision of the tribal authorities or the Commission to the Five Civilized Tribes to have the right of appeal within a limited time from such decision to the United States district court, whose decision should be final, and the rolls thus prepared it was provided

"shall be, and are hereby, made rolls of citizenship of said nations or tribes,"

and should be filed with the Commissioner of Indian Affairs

5 "to remain there for use as the final judgment of the duly constituted authorities."

That by the Act of June 7, 1897, (30 Stat., 62, 84), it was provided that the words "rolls of citizenship" as used in the act of June 10, 1896,

"shall be construed to mean the last authenticated rolls of each tribe which have been approved by the council of the nation, and the descendants of those appearing on such rolls, and such additional names and their descendants as have been subsequently added, either by the council of such nation, the duly constituted courts thereof, or the commission under the Act of June 10, 1896."

It was provided that all other names appearing upon such rolls, and not confirmed by the Act of June 10, 1896, as herein construed, might within six months from the passage of the act be stricken from the rolls

"Where the party affected shall have ten days previous notice that said commission will investigate and determine the right of such party to remain upon such roll as a citizen of such nation,"

provided, however, that the person so stricken from the rolls should have a right of appeal to the United States district court.

That by the Act of June 23, 1898, (30 Stat., 495-503) it was provided:

"Said commission is authorized and directed to make correct rolls of the citizens by blood of all the other tribes, eliminating from the tribal rolls such names as may have been placed thereon by fraud or without authority of law, enrolling such only as may have lawful right thereto, and their descendants born since such rolls were made.

* * * * * * *

"The rolls so made, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon, with their descendants thereafter born to them, with such persons as may intermarry according to the tribal laws, shall alone intermarry the several tribes which they represent."

That by the Act of May 31, 1900 (31 Stat., 221-236), it was provided that the commission

6 "shall not receive, consider, or make any record of any application of any persons for enrollment as a member of any tribe of the Indian Territory who has not been a recognized citizen thereof and duly and lawfully enrolled or admitted as such, and its refusal of such application shall be final when approved by the Secretary of the Interior."

That by the Act of March 3, 1901, (31 Stat., 1058-1077) it was provided

"the rolls made by the Commission to the Five Civilized Tribes, when approved by the Secretary of the Interior, shall be final, and

the persons whose names are found thereon shall alone constitute the several tribes which they represent"

and the Secretary of the Interior was directed to fix a time by agreement or otherwise,

"for closing said rolls, after which no name shall be added thereto."

That by the Act of July 1, 1902 (32 Stat., 641), ratifying an agreement between the United States and the Cherokee Nation it was provided that the rolls of citizenship of Cherokee citizens should be made in strict compliance with the Acts of Congress approved June 28, 1898, and May 31, 1900, aforesaid.

By Section 29 of said agreement it was provided:

"For the purpose of expediting the enrollment of the Cherokee citizens and the allotment of lands as herein provided, the said Commission shall, from time to time, and as early as practicable, forward to the Secretary of the Interior lists upon which shall be placed the names of those persons found by the Commission to be entitled to enrollment. The lists thus prepared, when approved by the Secretary of the Interior, shall constitute a part and parcel of the final roll of citizens of the Cherokee tribe, upon which allotment of lands and distribution of other tribal property shall be made. When there shall have been submitted to and approved by the Secretary of the Interior lists embracing the names of all those lawfully entitled to enrollment, the roll shall be deemed complete. The rolls so prepared shall be made in quadruplicate, one to be deposited with the Secretary of the Interior, one with the Commissioner of Indian Affairs, one with the principal chief of the Cherokee Nation, and one to remain with the Commission to the Five Civilized Tribes."

7 By Section 31, it was provided:

"No person whose name does not appear upon the roll as herein provided shall be entitled to in any manner participate in the distribution of the common property of the Cherokee tribe, and those whose names appear thereon shall participate in the manner set forth in this act."

By Section 20 it was provided:

"If any person whose name appears upon the roll prepared as herein provided shall have died subsequent to the first day of September, 1902, and before receiving his allotment, the lands to which such person would have been entitled if living shall be allotted in his name, and shall, with his proportionate share of other tribal property, descend to his heirs.

That by the Act of April 21, 1904, (33 Stat., 189-204) it was provided that the Commission to the Five Civilized Tribes should conclude its work on or before July 1, 1905, and cease thereafter to exist.

That by the Act of March 3, 1905, (33 Stat., 1048-50), it was provided that the Secretary of the Interior should complete the unfinished business of the Commission to the Five Civilized Tribes and there was conferred on him all the powers heretofore granted to the said commission.

That by the Act of April 26, 1906, (34 Stat., 137), it was provided that no person should be enrolled unless application for enrollment was made prior to December 1, 1905, and the rolls of citizenship were required to be completed by March 4, 1907.

7. That prior to July 2, 1904, the Secretary of the Interior affirmed a decision by the Commission to the Five Civilized Tribes holding that petitioner was entitled to enrollment as a citizen or member by blood of the Cherokee tribe or nation of Indians and after a full and careful inquiry into the right of petitioner
8 and of the record in the case, and without any fraud, concealment or artifice on the part of petitioner as to any matter of fact or law, either pertinent or impertinent or material or immaterial or relevant or irrelevant as to her right to enrollment the name of petitioner was prior to July 2, 1904, duly and regularly ordered placed on the final roll of citizens by blood of the Cherokee Nation and thereafter a final roll of citizens by blood of the Cherokee Nation containing the name of your petitioner as a citizen by blood of the Cherokee Nation was duly and regularly approved by the then lawful incumbent of the office of Secretary of the Interior, the name of your petitioner being duly entered and appearing on the regularly authenticated and approved final rolls of citizens by blood of the Cherokee Nation as follows:

*Cherokee Roll, by Blood.*

| No. | Name. | Age. | Sex. | Blood. | Cen. card. | No. |
|---|---|---|---|---|---|---|
| * * * | * * * | * | * | * * | * * | * |
| 31956 | Allison, Ida... | 19 | F | 1/16 | | |
| * * * | * * * | * | * | * * | * * | * |

(The * marks indicating other names were on said roll).

That said final roll was, on, to wit, the 2nd day of July, 1904, duly and regularly approved by the then lawful incumbent of the office of the Secretary of the Interior as is evidenced by the following genuine and regular notation at the bottom of said approved final roll:

Department of the Interior,
Washington, D. C., July 2, 1904.
Approved:
E. A. HITCHCOCK, *Secretary.*
L. R. S.

That petitioner's enrollment was approved under rules
9 regulations, custom and practice whereby notice was given of all steps affecting rights of parties with opportunity afforded for appeals and motions for rehearing and review by petitioner or the Cherokee Nation.

8. That prior to the time when, as will appear hereinafter, your petitioner's name was stricken from or attempted to be stricken from the final rolls of citizens by blood of the Cherokee Nation, without notice, as will appear hereinafter, your petitioner duly

and regularly selected an allotment of 120 acres of average allottable lands of the Cherokee Nation and after the name of your petitioner had been duly and regularly placed on the final approved rolls of the citizens by blood of the Cherokee Nation an allotment certificate was duly and regularly issued to your petitioner for the lands so selected by her by the Commission to the Five Civilized Tribes and is now held by her as conclusive evidence of the right of your petitioner to the lands so selected by her and described in the allotment certificate aforesaid. That the statutes made and provided under which your petitioner selected the allotment referred to and an allotment certificate was issued to her provide:

## Act of July 1, 1902.

"SECTION 11. There shall be allotted by the Commission to the Five Civilized Tribes and to each citizen of the Cherokee tribe, as soon as practicable after the approval by the Secretary of the Interior of his enrollment as herein provided, land equal in value to one hundred and ten acres of the average allottable lands of the Cherokee Nation, to conform as nearly as may be to the areas and boundaries established by the Government survey, which land may be selected by each allottee so as to include his improvements.

"SECTION 13. Each member of said tribe shall, at the time of the selection of his allotment, designate as a homestead out of said allotment land equal in value to forty acres of the average allottable lands of the Cherokee Nation, as nearly as may be, which shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of the certificate of allotment. Separate certificate shall issue for said homestead. During the time said homestead is held by the allottee the same shall be non-taxable and shall not be liable for any debt contracted by the owner thereof while so held by him.

"SECTION 14. Lands allotted to citizens shall not in any manner whatever or at any time be encumbered, taken, or sold to secure or satisfy any debt or obligation, or be alienated by the allottee or his heirs, before the expiration of five years from the date of the ratification of this Act.

"SECTION 15. All lands allotted to the members of said tribe, except such land as is set aside to each for a homestead as herein provided, shall be alienable in five years after issuance of patent.

"SECTION 16. If for any reason an allotment should not be selected or a homestead designated by or on behalf of any member of the tribe, it shall be the duty of said Commission to make said selection and designation.

SECTION 21. Allotment certificates issued by the Dawes Commission shall be conclusive evidence of the right of an allottee to the tract of land described therein, and the United States Indian agent for the Union Agency shall, under the direction of the Secretary of the Interior, upon the application of the allottee, place him in possession of his allotment, and shall remove therefrom all persons objectionable to him, and the acts of the Indian agent hereunder shall not be controlled by the writ or process of any court.

"SECTION 22. Exclusive jurisdiction is hereby conferred upon the Commission to the Five Civilized Tribes, under the direction of the Secretary of the Interior, to determine all matters relative to the appraisement and the allotment of lands."

9. That after the issuance to petitioner of said allotment certificate, the Secretary of the Interior, Ethan A. Hitchcock, predecessor in office of respondent as such Secretary of the Interior, arbitrarily, illegally and without notice of any kind whatsoever to your petitioner, who has only just learned what is now alleged to have taken place, undertook to deprive your petitioner of the rights by law vested in her and issued an order, which order, however, your petitioner alleges was inadequate for the purpose even had the Secretary of the Interior lawful right and power so to do, which
11 lawful right and power your petitioner denies, under which your petitioner's name, on some date to your petitioner unknown, though the same was subsequent to the issuance of an allotment certificate to your petitioner by the Commissioner to the Five Civilized Tribes, was stricken or attempted to be stricken from the aforesaid final approved rolls of citizens by blood of the Cherokee Nation by the mutilation of the said rolls as follows: a line drawn through your petitioner's name thus [Allison Ida]* and the writing after said name of the following: "See 23, 105—1907." That your petitioner is informed and believes that this action was taken upon the supposed theory that your petitioner came within, as to her rights as a citizen of the Cherokee Nation, an opinion rendered in the month of February, 1907, by the Attorney-General of the United States in some case to which your petitioner was not a party, either directly or indirectly, personally or by representation, and in which your petitioner had no hearing or right to be heard with the result to deprive your petitioner unless she be protected by this honorable court of her vested right to a share in the lands and funds of the Cherokee Nation without due process of law as guaranteed to your petitioner by the Constitution and laws of the United States and also by the Constitution and laws of the Cherokee Nation.

Your petitioner on information and belief further alleges that the respondent herein has cancelled the allotment of your petitioner herein referred to and has permitted other persons to ..e on the lands of your petitioner as allotments of said other persons and your petitioner's title and rights to the lands to be thereby
12 impaired and as your petitioner is further advised purposes to permit without the consent of your petitioner drilling for oil to take place on the allotment of your petitioner whose lands thereby will be drained of any oil thereon to the permanent and lasting injury of your complainant.

Your petitioner on information and belief avers the changes set forth above in the rolls were not noted prior to March 4, 1907, on all five of the rolls required by law to be made and deposited as provided by the Act of July 1, 1902, *supra*, and demands that respondent state on which of said rolls these changes were noted prior to

[* Words enclosed in brackets erased in copy.]

March 4th, last. Your petitioner further avers that since March 4, 1907, the said rolls, contrary to law, have been further changed and mutilated by writing in red ink above your petitioner's name on said rolls the following: "Cancelled M'ch 4, 1907."

10. Petitioner on information and belief avers that the true present value of the allotment selected by her and to which she has been issued an allotment certificate and of her share in the funds and in the surplus lands of the Cherokee Nation after all lawful members have been given their lawful share therein is in excess of five thousand dollars.

11. Your petitioner further states that she has made demand on the respondent as Secretary of the Interior that he cause the line run through petitioner's name to be erased and the notation placed opposite and above the name of your petitioner to be erased and to restore your petitioner to the rolls of citizens by blood of the Cherokee Nation as fully as she was thereon prior to the hereinbefore mentioned illegal and arbitrary act of respondent's predecessor in office in striking or attempting to strike petitioner's name therefrom and to refuse to permit other persons to file on the same as part of their allotment or to drill for oil thereon without your petitioner's assent and authority, but respondent has refused and neglected so to do, and on the contrary, as your petitioner is informed and believes, holds that petitioner is not an enrolled member or citizen of the Cherokee Nation nor entitled to share in its lands and funds and will be required to surrender the land allotted to her to any others who may legally file thereon and to permit the same to be denuded of any oil therein.

13

Wherefore, inasmuch as the Honorable James Rudolph Garfield, Secretary of the Interior, has refused to restore your petitioner to the approved rolls of members or citizens by blood of the Cherokee Nation, to remove the cloud placed by his predecessor in office on your petitioner's rights, claims and demands as an enrolled citizen or member of the Cherokee Nation to recognize your petitioner as a lawfully enrolled citizen or member of said nation, and to refuse to permit other persons to take the lands of your petitioner in allotment and to drill for oil therein without your petitioner's authority and as the law provides no other adequate remedy in the premises whereby your petitioner can be protected in her lawful rights whereof she is now unjustly and arbitrarily deprived, your petitioner prays:

1. That a writ of mandamus may be issued and directed to the Honorable James Rudolph Garfield, Secretary of the Interior, commanding him to erase or cause to be erased the marks or notations made on the approved rolls of the members by blood of the Cherokee Nation in derogation of your petitioner's rights or claims as a duly and lawfully enrolled citizen or member by blood of said nation, to restore your petitioner to full and lawful enrollment as a citizen or member by blood in said Cherokee Nation to recognize your petitioner as a lawful citizen or member by blood of said Cherokee Nation with all the rights and privileges thereunto appertaining and to refuse to permit any other person to take or

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hold in allotment the lands allotted to your petitioner or to drill for oil thereon without your petitioner's authority.

2. For such other and further right or rights or relief as to the Court may seem proper and the nature of your petitioner's case may require.

And as in duty bound, your petitioner will ever pray.

IDA ALLISON, *Petitioner.*

DISTRICT OF COLUMBIA, *ss:*

Before the subscriber, a Notary Public in and for the District of Columbia, on the 10th day of May, A. D. 1907, personally appeared Chas. H. Merillat, who made oath on the Holy Evangels of Almighty God that he is the attorney of Ida Allison, the within petitioner, and is authorized by her to institute these proceedings; that he has read the petition subscribed and that the facts set forth in said petition are true to the best of deponent's knowledge and belief.

CHARLES H. MERILLAT.

Subscribed and sworn to before me this 10" day of May, A. D. 1907.

J. R. YOUNG, *Clerk.*
By ALF. G. BUHRMAN, *Ass't Clk.*

15 *Rule to Show Cause.*

Filed May 10, 1907.

In the Supreme Court of the District of Columbia.

Law. No. 49433.

THE UNITED STATES OF AMERICA *ex Rel.* IDA ALLISON, Petitioner,
*vs.*
JAMES R. GARFIELD, Secretary of the Interior, Respondent.

On consideration of the petition filed herein on the 10th day of May, 1907, it is by the Court this 10th day of May 1907, ordered that the Respondent show cause on or before the 17th day of May, 1907, why the writ of mandamus should not issue as prayed.

WRIGHT, *Justice.*

*Marshal's Return.*

Served copy of the within rule to show cause, together with copy of the petition in this cause, on James R. Garfield, Secretary of the Interior, personally May 10, 1907.

AULICK PALMER, *Marshal.*
S.

16 *Answer of Respondent to Rule to Show Cause and to Petition.*

Filed June 4, 1907.

In the Supreme Court of the District of Columbia.

At Law. No. 49433.

THE UNITED STATES *ex Rel.* IDA ALLISON, Petitioner,
*vs.*
JAMES RUDOLPH GARFIELD, Secretary of the Interior, Respondent.

The respondent, for answer to the rule to show cause why a writ of mandamus should not issue against him as prayed in the petition and to said petition, says:

1. That he does not admit that petitioner is a citizen of the United States or a member of the Cherokee Nation and a Cherokee by blood.

2. Respondent admits that he is a citizen of the United States, temporarily residing in the District of Columbia, and that he succeeded Ethan A. Hitchcock as Secretary of the Interior on March 5, 1907.

3. Respondent admits that, under the laws of Congress and the agreements with the Cherokee Nation, it was the province and duty of his predecessor, as Secretary of the Interior, to take final action upon the applications of persons to be enrolled as members of the Five Civilized Tribes in the Indian Territory, as provided by law, including the Cherokee Nation.

17 Respondent further says that by the act of July 1, 1902 (32 Stat., 716, sec. 22), exclusive jurisdiction of all matters relating to the allotment of lands in said Nation was conferred upon the Commission to the Five Civilized Tribes, under the direction of the Secretary of the Interior, and that by the act of March 3, 1905 (33 Stat., 1048, 1060), such jurisdiction was devolved exclusively upon the Secretary of the Interior.

4. Respondent admits that the lands occupied by the Cherokee Nation in the Indian Territory were granted and secured to it by the treaties referred to in the fourth paragraph of the petition.

5. Respondent admits that said nation has not become extinct or abandoned said lands, but does not admit that petitioner is a member of the Cherokee Nation, and denies that she has acquired a vested right to any specific tract or allotment of land in said nation, or that she is duly enrolled as a member of said nation, upon the rolls prepared by the Commission to the Five Civilized Tribes and the Secretary of the Interior as provided by law, and thereby entitled to a distributive share in the funds and surplus lands of said nation.

6. Respondent admits that provision was made for the enrollment of members of the Five Civilized Tribes in the Indian Territory for the purpose of allotting the lands of said nations in severalty, as set forth in the several acts referred to in the sixth paragraph of the petition.

7. Respondent admits that petitioner was enrolled as a member by blood of the Cherokee Nation upon a partial list of such members approved as set out in paragraph seven of the bill, but avers that thereafter and prior to the time fixed by Congress for
18 the completion of the rolls of members of said nation, the Secretary of the Interior disapproved the enrollment of petitioner and struck her name from said rolls, as set out in paragraph 9 of this answer.

8. Respondent admits that a certificate of allotment was issued to petitioner by the Commission to the Five Civilized Tribes on May 14, 1904, for certain lands selected by her, but says that the Secretary of the Interior has never approved such allotment and that no patent has been issued or recorded therefor.

9. Respondent says that the name of petitioner was stricken from the partial list of members of the Cherokee Nation prepared and approved as aforesaid, by order of his predecessor as Secretary of the Interior, on March 4, 1907, prior to the expiration of the time fixed by the act of April 26, 1906 (43 Stat., 137), for the completion of the rolls of said nation, and a notation thereof made upon the copy of said list in his possession and petitioner's name lined out thereon on the same day, as appears from the copies of the records of the Interior Department marked Exhibits A, B and C hereto attached and made a part hereof, and that petitioner's name was lined out upon the other four copies of said list in pursuance of said order of his predecessor after March 4, 1907, one of said copies being in the possession of the Commissioner of Indian Affairs and the other three in the possession of the Commissioner to the Five Civilized Tribes.

Respondent further says that the words "328 p. c. 258," after the words "Cancelled March 4 07" on his copy of said list refer
19 to the number and page of the press copy book into which was copied the letter of his predecessor of March 4, 1907, striking the name of petitioner from the rolls.

And respondent avers that the action of his predecessor in striking the name of petitioner from the approved rolls of members of the Cherokee Nation, as aforesaid, was in accordance with his long established practice, extending from the time that the act of July 1, 1902 (32 Stat., 716), went into effect until March 4, 1907, during which time his predecessor, as the approved rolls of the Five Civilized Tribes in respondent's possession show, struck several hundred names from said rolls because, in his judgment, they were improperly enrolled [, and that Congress has recognized and sanctioned such practice.]*

Respondent says that there was no rule or regulation requiring the giving of notice in such cases. As to the matter of notice, respondent says that, as he is advised and believes, his predecessor at first exercised the right to strike names from approved lists of members of the Five Civilized Tribes, prior to the time fixed for the completion of the rolls, when in his judgment they were improperly and unlawfully enrolled, without notice to the party concerned, but that

[*Words enclosed in brackets erased with red ink in copy.]

for about three years, prior to March 4, 1907, the date fixed by the act of Congress of April 26, 1907, for the completion of the rolls, it had been the custom or practice of his predecessor to give notice in such cases and afford the party concerned an opportunity to be heard, but respondent says that, owing to the limited time in which his predecessor had to act before the expiration of the time
20 fixed for completing the rolls, it was impossible to give notice and opportunity to be heard in the case of this petitioner and a large number of other persons whose right to be enrolled was believed by his predecessor to be adversely affected by the principles announced in an opinion rendered his predecessor by the Attorney General on February 19, 1907, in the case of certain other persons who had been enrolled as members of the Choctaw Nation for allotment purposes, and who were stricken from the rolls by his predecessor in consequence of that opinion.

10. Respondent says that he is not advised as to the value of the lands or moneys claimed by petitioner.

11. Respondent admits that petitioner made demand that respondent restore petitioner to said roll and that he refused so to do.

Further answering respondent says that by the act of Congress of April 26, 1907 (34 Stat., 137), the rolls of members of the Cherokee Nation were required to be fully completed on or before March 4, 1907, and the Secretary of the Interior was deprived of jurisdiction to approve the enrolment of any person after that date.

Respondent further says that petitioner applied in 1896 to the Commissioner to the Five Civilized Tribes to be admitted and enrolled as a citizen of the Cherokee Nation under the act of June 10, 1896 (29 Stat., 329), and her application was denied; that no appeal was taken by her from such judgment to the United States Court for the Indian Territory, as provided in that act, whereby such judgment became final, and that thereafter the Commissioner to the
21 Five Civilized Tribes and Secretary of the Interior had no jurisdiction or authority to enroll petitioner.

Respondent further says that the matters sought to be controlled by the petition relate to the allotment of land in severalty in the Cherokee Nation, and that by the legislation of Congress exclusive jurisdiction of all matters relating to the allotment of lands in severalty in said nation has been conferred upon the Secretary of the Interior.

Respondent further says that the matters sought to be controlled by the petition involve the exercise of judgment and discretion on the part of the Secretary of the Interior.

Wherefore respondent prays that the rule against him be discharged and the petition dismissed at the cost of petitioner.

JAMES RUDOLPH GARFIELD,
*Secretary of the Interior.*

EDWARD T. SANFORD,
*Assistant Attorney-General,*
WILLIAM R. HARR,
*Special Assistant to Attorney-General,*
***For Respondent.***

22 UNITED STATES OF AMERICA, *District of Columbia, ss:*

James Rudolph Garfield, being duly sworn, deposes and says: That he is the respondent in the above entitled cause; that he has read the foregoing answer and knows the contents thereof, and that the same is true to the best of his knowledge and belief.

JAMES RUDOLPH GARFIELD.

Subscribed and sworn to before me this 4th day of June, 1907.

[SEAL.] EDW. B. FOX,
*Notary Public, D. C.*

23 (Copy.) EXHIBIT "A."

I. T. D. 6920-1907. L. R. S. *Direct.*

DEPARTMENT OF THE INTERIOR. WASHINGTON, *March* 4, 1907.

Y. P. L. L. B.

Commissioner to the Five Civilized Tribes, Muskogee, Indian Territory.

SIR: In accordance with the recommendation contained in your letter of February 27, 1907, relative to names to be stricken from the partial roll of Cherokee citizens, and Indian Office letter of March 2, 1907, and referring to Departmental letter of even date upon a similar report by you, relative to the names of persons to be stricken from the partial rolls of the Choctaw and Chickasaw nations, the names of the persons mentioned below have been stricken from the partial rolls of citizens of the Cherokee Nation, opposite the numbers mentioned:

31910 Allison, John.
31956 Allison, Ida B.
31957 Allison, George A. Patent recorded.
31958 Allison, Elmer C.
31959 Allison, Jasper P. Patent recorded.
31960 Allison, Johnnie S.
31961 Allison, Frankie P. Patent recorded

If by inadvertence the name of anyone has been left on any partial roll of the Cherokee Nation after decision adverse to him was made by the Department prior to March 5, 1907, and since the opinion of the Attorney-General referred to, the name of such person will be stricken from the roll as of this date.

A carbon copy hereof has been sent to the Indian Office.

Respectfully,
(Signed) E. A. HITCHCOCK, *Secretary.*

24 (Copy.) EXHIBIT "B."

DEPARTMENT OF THE INTERIOR.

Commissioner to the Five Civilized Tribes.

Direct.

MUSKOGEE, INDIAN TERRITORY, *February* 27, 1907.

The Honorable Secretary of the Interior.

SIR: I am in receipt of Departmental telegram of February 23, 1907, directing me to inspect the approved rolls of citizens of the Cherokee Nation to determine what persons have been enrolled thereon contrary to the views expressed by the Attorney-General in his opinion of February 19, 1907, and whose names should be stricken therefrom, and also directing me to furnish the Department with a list of such names, with their roll numbers, and such information as will permit of its being determined whether such names should be stricken from the rolls. I am also in receipt of Departmental letter of same date (I. T. D. 4564-1907), confirming said telegram.

In reply thereto, here follows a list of the persons whose names appear upon the final approved rolls of the Cherokee Nation whose right to enrollment is adversely affected by the opinion of the Attorney General of February 19, 1907, and in the opinion of this office the names should, if the opinion of the Attorney General is to be followed in all cases, be stricken from the final roll of citizens of the Cherokee Nation, as their names appear thereon opposite
25 the numbers indicated.

Sufficient data accompanies each case referred to to indicate reasons for the above recommendation.

31910 Allison, John.
31956 Allison, Ida B.
31957 Allison, George A. Patent recorded.
31958 Allison, Elmer C.
31959 Allison, Jasper P. Patent recorded.
31960 Allison, Johnnie S.
31961 Allison, Frankie P. Patent recorded.

Of the above named persons application was made to the Commission to the Five Civilized Tribes for the admission to citizenship in the Cherokee Nation, under the provisions of the Act of Congress approved June 10, 1896 (29 Stat., 321), for John Allison, Ida B. Allison, George A. Allison, Elmer C. Allison, and Jasper P. Allison; their application was denied by the Commission and no appeal was taken therefrom.

The decision of the Commission to the Five Civilized Tribes granting the application of John Allison for enrollment as a citizen by blood of the Cherokee Nation was affirmed by the Department April 11, 1904 (I. T. D. 9038-1903-2866-1904). The decision of

the Commission to the Five Civilized Tribes granting the application for the enrollment of the other above named persons as citizens by blood of the Cherokee Nation, was affirmed by the Department April 16, 1904 (I. T. D. 2858-1904).

Johnnie S. Allison and Frankie P. Allison are minor
26 children of Jasper P. Allison, were born since the decision of the Commission under the Act of June 10, 1896, and possess no right to enrollment as citizens of the Cherokee Nation, other than as descendants of their said father.

The mother of these persons, other than Johnnie S. and Frankie P. Allison, was Margaret Allison, now deceased, who was admitted to citizenship in the Cherokee Nation under an Act of the Cherokee National Council approved December 8, 1894, conditioned upon her removal to the Cherokee Nation within six months from the approval of said Act. The records in these cases show that she complied with the requirements of the Act. Her said children were minors when she was admitted to citizenship, and they removed to and settled in the Cherokee Nation in 1894.

The records of this office further show that said Margaret Allison applied to the Commission to the Five Civilized Tribes for admission to citizenship in the Cherokee Nation, under said Act of June 10, 1896, and that her application was also denied by the Commission.

The status of the persons whose names appear in the above list as citizens of the Cherokee Nation, remains unchanged since 1896 except as above noted.

In the above list in all cases where patents have been recorded in the Office of the Commissioner to the Five Civilized Tribes, notation has been made to that effect. Where no notation relative to patents appears it indicates that no patents to any allotment selection which may have been made by the person affected, has been recorded.

27 Those persons enrolled in the Choctaw, Chickasaw, and Creek Nations, whose right to enrollment is adversely affected by the opinion of the Attorney General of February 19, 1907, heretofore referred to, will be made the subjects of separate communications of this date.

Respectfully,

(Signed) TAMS BIXBY, *Commissioner.*

L. M. B.

28 EXHIBIT "C."

Filed June 4, 1907.

*Cherokee Roll, Indians by Blood.*

| No. | | Age. | Sex. | Blood. | Census card. |
|---|---|---|---|---|---|
| ..... | ..... | ..... | ..... | ..... | ..... |
| | Cancelled March 4, 1907, 328 p. c. 258. | | | | |
| [31910 | Allison, John..... | 27 | M | 1/32 | 10778]* |
| ..... | ..... | ..... | ..... | ..... | ..... |
| | Cancelled March 4, 1907, 328 p. c. 258. | | | | |
| [31956 | Allison, Ida B..... | 19 | F | 1/16 | 5091]* |
| | Cancellad March 4, 1907, 328 p. c. 258. | | | | |
| [31957 | Allison, George A..... | 21 | M | 1/16 | 5094]* |
| | Cancelled March 4, 1907, 328 p. c. 258. | | | | |
| [31958 | Allison, Elmer C..... | 17 | M | 1/16 | 5094]* |
| | Cancelled March 4, 1907, 328 p. c. 258. | | | | |
| [31959 | Allison, Jasper P..... | 25 | M | 1/16 | 5094]* |
| | Cancelled March 4, 1907, 328 p. c. 258. | | | | |
| [31960 | Allison, Johnnie S..... | 1 | M | 1/32 | 5095]* |
| | Cancelled March 4, 1907, 328 p. c. 258. | | | | |
| [31961 | Allison, Frankie P..... ... | 1 | M | 1/32 | 5095]* |
| ..... | ..... | ..... | ..... | ..... | ..... |

Department of the Interior,
Washington, D. C., July 2, 1904.
L. R. S.
Approved
E. A. HITCHCOCK, *Secretary.*

29 *Demurrer.*

Filed June 6, 1907.

In the Supreme Court of the District of Columbia.

At Law. No. 49433.

THE UNITED STATES *ex Rel.* IDA ALLISON, Petitioner,
*vs.*
JAMES RUDOLPH GARFIELD, Secretary of the Interior, Respondent.

The petitioner says that the answer filed by respondent in the above entitled cause is bad in substance.

JAMES K. JONES,
KAPPLER & MERILLAT,
*Attorneys for Petitioner.*

[* Words and figures enclosed in brackets erased in copy.]

NOTE.—One matter to be argued on demurrer is that the answer sets forth no sufficient reason in law for the cancellation by the Secretary of the Interior without notice of the enrollment of petitioner duly and regularly ordered.

30 Supreme Court of the District of Columbia.

FRIDAY, *August 2d*, 1907.

Session resumed pursuant to adjournment, Mr. Justice Barnard, presiding.

* * * * * * *

By Justice Wright.

At Law. No. 49433.

UNITED STATES OF AMERICA *ex Rel.* IDA ALLISON, Petitioner,
*vs.*
JAMES RUDOLPH GARFIELD, Secretary of the Interior, Respondent.

Upon hearing the petitioner's demurrer to the Answer of the Respondent herein, it is considered that said demurrer be, and the same is hereby sustained, and the Respondent by his Attorney says he will stand upon his answer: Thereupon, the Court being fully advised, it is considered, ordered and adjudged that the Respondent James Rudolph Garfield, be, and he is hereby commanded within twenty days after this date to restore the name of the Relator to the rolls of members or citizens of the Chickasaw Tribe or Nation, to erase from said rolls the statements placed thereon derogatory to Relator's rights in said tribe of said Chickasaw Tribe and to recognize Relator as an enrolled member of said tribe.

The Respondent thereupon in open Court by counsel excepted to the judgment so rendered and prayed an appeal from the judgment of this Court to the Court of Appeals of the District of Columbia, which was allowed. And pending such appeal the judgment is stayed and no writ shall issue thereon against the Respondent.

31 *Order Extending Time of Filing Transcript of Record.*

Filed September 18, 1907.

In the Supreme Court of the District of Columbia.

At Law. No. 49433.

THE UNITED STATES OF AMERICA *ex Rel.* IDA ALLISON
*vs.*
JAMES RUDOLPH GARFIELD, Secretary of the Interior.

The time for producing and filing with the Clerk of the Court of Appeals the transcript of record in the above-entitled cause, is hereby extended to and including the 15th day of October, A. D. 1907.

HARRY M. CLABAUGH,
*Chief Justice.*

32 *Directions to Clerk as to Preparation of Record*

Filed September 25, 1907.

In the Supreme Court of the District of Columbia.

At Law. No. 49433.

THE UNITED STATES *ex Rel.* IDA ALLISON, Petitioner,
*vs.*
JAMES RUDOLPH GARFIELD, Secretary of the Interior.

In preparing the transcript of the record in this case for the Court of Appeals the Clerk will please copy:

1. Petition (including Exhibits) and rule to show cause.
2. Answer (including Exhibits), inserting amendment to paragraph nine at end of that paragraph and omitting all orders in regard to amendments.
3. Demurrer to Answer.
4. Order sustaining demurrer and allowing appeal and supersedeas—Minutes 49, p. 386.
5. Order extending time to file Transcript of Record.

EDWARD T. SANFORD,
WILLIAM R. HARR,
*Attorneys for Respondent.*

33 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify that the foregoing pages numbered from 1 to 32, both inclusive, are a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 49433 At Law, wherein The United States of America, *ex relatione* Ida Allison, is Petitioner, and James Rudolph Garfield, Secretary of the Interior, is Respondent, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the city of Washington, in said District, this 14th day of October, A. D. 1907.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1838. James Rudolph Garfield, Secretary of the Interior, appellant, *vs.* The United States of America *ex rel.* Ida Allison. Court of Appeals, District of Columbia. Filed Oct. 14, 1907. Henry W. Hodges, clerk.

20 WEDNESDAY, *November 6th, A. D. 1907.*

JAMES RUDOLPH GARFIELD, SECRETARY of the Interior, Appellant,
*vs.*
THE UNITED STATES OF AMERICA, EX relatione John E. Goldsby. } No. 1829.

JAMES RUDOLPH GARFIELD, SECRETARY of the Interior, Appellant,
*vs.*
THE UNITED STATES OF AMERICA, EX rel. Ida Allison. } No. 1838.

and

JAMES RUDOLPH GARFIELD, SECRETARY of the Interior, Appellant,
*vs.*
THE UNITED STATES OF AMERICA, EX rel. George A. Allison. } No. 1830.

The argument in the above-entitled causes was commenced by Mr. Edward T. Sanford, attorney for the appellant, and was continued by Mr. C. H. Merillat, attorney for the appellees, and was concluded by Mr. Wm. R. Harr, attorney for the appellant.

21 In the Court of Appeals of the District of Columbia.

JAMES RUDOLPH GARFIELD, SECRETARY of the Interior, Appellant,
*vs.*
THE UNITED STATES OF AMERICA, EX rel. John E. Goldsby, Appellee. } No. 1839.

JAMES RUDOLPH GARFIELD, SECRETARY of the Interior, Appellant,
*vs.*
THE UNITED STATES OF AMERICA, EX rel. Ida B. Allison, Appellee. } No. 1838.

JAMES RUDOLPH GARFIELD, SECRETARY of the Interior, Appellant,
*vs.*
THE UNITED STATES OF AMERICA, EX rel. George A. Allison, Appellee. } No. 1839.

*Stipulation.*

It is hereby stipulated between the parties hereto that these causes are submitted on the printed record and briefs and the argument heretofore made to the justices who sat in the above-entitled causes, exclusive of the late Associate Justice McComas, namely, Mr. Chief Justice Shepard and Mr. Justice Barnard, provided, however, that if the remaining justices shall be divided in opinion, the several causes shall not be affirmed by a divided court, but shall be assigned for reargument.

EDWARD T. SANFORD,
*Asst. Atty. Gen.,*
WILLIAM R. HARR,
*Attorneys for Appellant.*
KAPPLER & MERILLAT,
Per CHAS. H. MERILLAT,
*Attorneys for Appellees.*

22 (Endorsed:) Nos. 1829, 1838 & 1839. Garfield *v.* U. S. ex rel. Goldsby; Garfield *v.* U. S. ex rel. Allison; Garfield *v.* U. S. ex rel. Allison. Stipulation to submit case on records and briefs to the Chief Justice and Justice Barnard. Court of Appeals, District of Columbia, filed November 19, 1907. Henry W. Hodges, clerk.

23 JAMES RUDOLPH GARFIELD, SECRETARY of the Interior, Appellant, *vs.* THE UNITED STATES OF AMERICA, EX REL. Ida Allison. } No. 1838.

*Opinion.*

(Mr. Chief Justice Shepard delivered the opinion of the court:)

As in the case of George Allison, submitted at the same time with this, the Secretary of the Interior appeals from an order of the Supreme Court of the District of Columbia, directing him to erase the marks indicating the cancellation of relator's name from the approved roll of members of the Cherokee Nation and restore her name to said roll.

The facts relating to the membership of relator of said nation and to the entry of her name on the roll preparatory to allotment of lands and distribution of funds and the attempted cancellation thereof are identical with those shown in the said case of George Allison, with this immaterial exception, namely, that while a certificate of allotment has been issued to the relator, no patent thereon has yet been issued to her.

As in the case of George Allison, for the reasons given in the opinion in the case of Garfield *v.* U. S. ex rel. Goldsby, the order appealed from will be affirmed with costs. It so ordered.

Affirmed.

24 FRIDAY, *November 29th, A. D. 1907.*

| | |
|---|---|
| JAMES RUDOLPH GARFIELD, SECRETARY of the Interior, Appellant, *vs.* THE UNITED STATES OF AMERICA, EX REL. Ida Allison. | No. 1838. October term 1907. |

Appeal from the Supreme Court of the District of Columbia. This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said Supreme Court in this cause be, and the same is hereby, affirmed with costs.

Per Mr. Chief Justice SHEPARD.

NOVEMBER 29, 1907.

MONDAY, *January 6th, A. D. 1908.*

| | |
|---|---|
| JAMES RUDOLPH GARFIELD, SECRETARY of the Interior, Appellant, *vs.* THE UNITED STATES OF AMERICA, EX rel. Ida Allison. | No. 1838. |

On motion of Mr. W. R. Harr, of counsel for the appellant, it is ordered by the court that a writ of error to remove this cause to the Supreme Court of the United States issue. And it is further ordered that the mandate in said cause be, and the same is hereby, stayed until further order.

26 UNITED STATES OF AMERICA, *ss:*

*The President of the United States, to the honorable the justices of the Court of Appeals of the District of Columbia, greeting:*

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between James Rudolph Garfield, Secretary of the Interior, appellant, and the United States of America ex rel. Ida Allison, Appellee, a manifest error hath happened, to the great damage of the said appellant as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 6th day of January, in the year of our Lord one thousand nine hundred and eight.

[SEAL.] HENRY W. HODGES,
*Clerk of the Court of Appeals of the District of Columbia.*

Allowed by

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27 UNITED STATES OF AMERICA, *ss:*

*To the United States of America ex rel. Ida Allison, greeting:*

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein James Rudolph Garfield, Secretary of the Interior, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard, Chief Justice of the Court of Appeals of the District of Columbia, this 6th day of January, in the year of our Lord one thousand nine hundred and eight.

SETH SHEPARD,
*Chief Justice of the Court of Appeals of the District of Columbia.*

Service accepted this 6th day of January A. D., 1908.

CHARLES H. MERILLAT.

28 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 27, inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of James Rudolph Garfield, Secretary of the Interior, Appellant, *vs.* The United States of America, ex rel. Ida Allison, No. 1838, January term, 1908, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 11th day of January, A. D., 1908.

[SEAL.] HENRY W. HODGES,
*Clerk of the Court of Appeals of the District of Columbia.*

(Indorsement on cover:) File No. 20976. District of Columbia, Court of Appeals. Term No. 573. James Rudolph Garfield, Secretary of the Interior, Plaintiff in Error, *vs.* The United States of America ex rel. Ida Allison. Filed January 17th, 1908. File No. 20976.

O

# TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903

No. 250.

JAMES RUDOLPH GARFIELD, SECRETARY OF THE INTERIOR, PLAINTIFF IN ERROR,

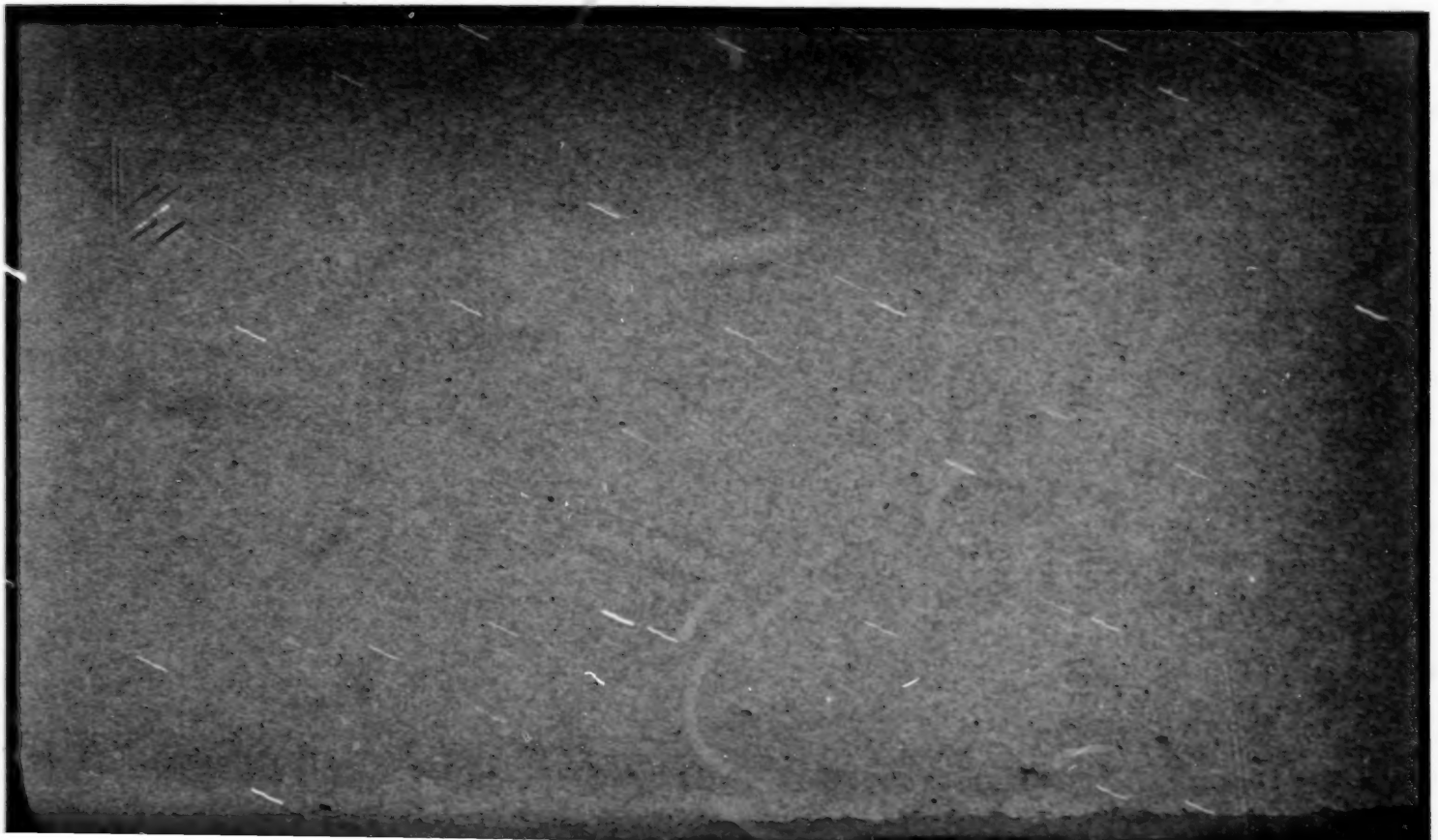
vs.

THE UNITED STATES OF AMERICA EX REL. GEORGE A. ALLISON.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED JANUARY 11, 1904.

(20977)



# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1907.

## No. 574.

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JAMES RUDOLPH GARFIELD, SECRETARY OF THE INTERIOR, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA EX REL. GEORGE A. ALLISON.

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IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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# In the Court of Appeals of the District of Columbia.

No. 1839.

JAMES RUDOLPH GARFIELD, Secretary of the Interior, Appellant,
*vs.*
THE UNITED STATES OF AMERICA *ex Rel.* GEORGE A. ALLISON.

a Supreme Court of the District of Columbia.

At Law. No. 49435.

THE UNITED STATES OF AMERICA *ex Relatione* GEORGE A. ALLISON, Petitioner,
*vs.*
JAMES RUDOLPH GARFIELD, Secretary of the Interior, Respondent.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Petition for Writ of Mandamus.*

Filed May 10, 1907.

In the Supreme Court of the District of Columbia.

At Law. No. 49435.

THE UNITED STATES OF AMERICA *ex Relatione* GEORGE A. ALLISON, Petitioner,
*vs.*
JAMES RUDOLPH GARFIELD, Secretary of the Interior, Respondent.

Your petitioner respectfully represents:

1. That he is a citizen of the United States and a citizen, member and resident of the Cherokee Nation in the Indian Territory, and a Cherokee Indian by blood.

2. That the respondent, James Rudolph Garfield, is a citizen of the United States, temporarily residing in the District of Columbia,

and is an officer of the Government of the United States and Secretary of the Interior in said Government and is sued as such, having succeeded on March 5, 1907, as said Secretary of the Interior the Ethan A. Hitchcock, hereinafter mentioned.

3. That, as heretofore stated, respondent's immediate predecessor in office as Secretary of the Interior was Ethan A. Hitchcock, to whom as said Secretary of the Interior was committed by Congress under certain laws hereinafter referred to the duty of final action on applications for citizenship in the Five Civilized Tribes
2 in the Indian Territory and of approving the enrollment of those applicants whom he should deem entitled to be placed on the final rolls of members or citizens of any one of the Five Civilized Tribes or Nations, the Cherokee tribe or Nation being one of the said Five Civilized Tribes.

4. That by certain treaties and agreements between the United States and the Cherokee Nation of Indians the Cherokee Nation ceded to the United States the lands guaranteed to it by treaties with the United States east of their present home in exchange for the lands whereon said nation now resides and by Article I of the treaty between the United States and the Cherokee Nation proclaimed August 17, 1846, (9 Stats. at Large) the lands whereon said Cherokee Nation now resides and in which lands your petitioner has been given an allotment as his share of the lands of his tribe or nation were ceded by the United States to the Cherokee Nation in fee simple, said Article I being as follows:

"Article I. That the lands now occupied by the Cherokee Nation shall be secured to the whole Cherokee people for their common use and benefit; and a patent shall be issued for the same, including the eight hundred thousand acres purchased, together with the outlet west, promised by the United States, in conformity with the provisions relating thereto, containing in the third article of the treaty of 1835, and in the third section of the act of Congress, approved May twenty-eighth, 1830, which authorizes the President of the United States, in making exchanges of lands with the Indian tribes, "to assure the tribe or nation with which the exchange is made, that the United States will forever secure and guarantee to them, and their heirs or successors, the country so exchanged with them; and if they prefer it, that the United States will cause a patent or grant to be made and executed to them for the same: *Provided, always,* That such lands shall revert to the United States if the Indians become extinct or abandon the same."

3 5. That said Indians and their heirs have not become extinct and have not abandoned the said land or any part thereof; that the reversionary interest of the United States in said lands has been otherwise terminated and surrendered to said *to said* Indians by the Acts of Congress, treaties and agreements herein mentioned; that your petitioner is and likewise has been long recognized by the Cherokee Nation as a Cherokee citizen or member of said tribe by blood; that your petitioner as one of the heirs of the Indians referred to in the said treaty proclaimed in 1846 was entitled prior to allotment as hereinafter mentioned to an equal undivided interest

in the whole of the lands of the Cherokee Nation after certain lands were duly and lawfully reserved for town site, charitable and certain specified purposes in accordance with Acts of Congress and agreements duly entered into and approved and ratified by the nations, parties thereto, between the United States and the Cherokee Nation; and is now the owner of and is possessed in vested right of a lawful allotment of land in the Cherokee Nation and is further entitled to an equal, undivided distributive share in the funds and surplus — of the Cherokee Nation after allotments, as hereinafter referred to, are made to all the duly enrolled members of the Cherokee Nation.

6. That under the provisions of various acts of Congress a Commission to the Five Civilized Tribes was created for the purpose, among other things, of making agreements with each of the Five Civilized Tribes for the division in severalty among their
4 citizens or members of the lands held by them in common, of enrolling under the direction and approval of the Secretary of the Interior the members or citizens of each and every one of the Five Civilized Tribes and of alloting in severalty in fee simple to the members of the Cherokee Nation the lands held by said nation as above set forth. That under the provisions of said Acts of Congress, of agreements effected in accordance therewith, and of treaties between the United States and said Indian tribes rolls of members of each of the tribes were directed to be prepared by said Commission under the supervision of the Secretary of the Interior from time to time and it was provided that when the enrollment of any person as a member of any one of the Five Civilized Tribes should be approved by the Secretary of the Interior his name should be placed on the final roll of said tribe, and he thereby should become and be a member of the said tribe or nation and entitled to an allotment, in the Cherokee Nation, of 120 acres of average allottable land in said nation, and to the other rights and privileges common to citizens of said nation.

That by the Act of June 10, 1896, (29 Stat., 321, 329) it was provided:

"that the rolls of citizenship of the several tribes as now existing are hereby confirmed"

and that either the Commission to the Five Civilized Tribes or the legally constituted court or committee on citizenship of the several tribes should determine, after hearing, the applications of
5 persons claiming right to be admitted and enrolled in the several nations, either the tribe or any person aggrieved by any decision of the tribal authorities or the Commission to the Five Civilized Tribes to have the right of appeal within a limited time from such decision to the United States district court, whose decision should be final, and the rolls thus prepared it was provided

"shall be, and are hereby, made rolls of citizenship of said nations or tribes,"

and should be filed with the Commissioner of Indian Affairs

"to remain there for the use as the final judgment of the duly constituted authorities."

That by the Act of June 7, 1897, (30 Stat., 62, 84), it was provided that the words "rolls of citizenship" as used in the act of June 10, 1896,

"shall be construed to mean the last authenticated rolls of each tribe which have been approved by the council of the nation, and the descendants of those appearing on such rolls, and such additional names and their descendants as have been subsequently added, either by the council of such nation, the duly constituted courts thereof, or the commission under the Act of June 10, 1896."

It was provided that all other names appearing upon such rolls, and not confirmed by the Act of June 10, 1896, as herein construed, might within six months from the passage of the act be stricken from the rolls

"Where the party affected shall have ten days previous notice that said commission will investigate and determine the right of such party to remain upon such roll as a citizen of such nation,"

provided, however, that the person so stricken from the rolls should have a right of appeal to the United States district court.

6 That by the Act of June 23, 1898, (30 Stat., 495-503) it was provided:

"Said commission is authorized and directed to make correct rolls of the citizens by blood of all the other tribes, eliminating from the tribal rolls such names as may have been placed thereon by fraud or without authority of law, enrolling such only as may have lawful right thereto, and their descendants born since such rolls were made.

* * * * * * *

"The rolls so made, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon, with their descendants thereafter born to them, with such persons as may intermarry according to the tribal laws, shall alone constitute the several tribes which they represent."

That by the Act of May 31, 1900 (31 Stat., 221-236), it was provided that the commission

"shall not receive, consider, or make any record of any application of any persons for enrollment as a member of any tribe of the Indian Territory who has not been a recognized citizen thereof and duly and lawfully enrolled or admitted as such, and its refusal of such application shall be final when approved by the Secretary of the Interior."

That by the Act of March 3, 1901, (31 Stat., 1058-1077) it was provided

"the rolls made by the Commission to the Five Civilized Tribes, when approved by the Secretary of the Interior, shall be final, and

the persons whose names are found thereon shall alone constitute the several tribes which they represent"

and the Secretary of the Interior was directed to fix a time by agreement or otherwise,

"for closing said rolls, after which no name shall be added thereto."

That by the Act of July 1, 1902 (32 Stat., 641), ratifying an agreement between the United States and the Cherokee Nation it was provided that the rolls of citizenship of Cherokee citizens should be made in strict compliance with the Acts of Congress ap-
7 proved June 28, 1898, and May 31, 1900, aforesaid.

By Section 29 of said agreement it was provided:

"30. For the purpose of expediting the enrollment of the Cherokee citizens and the allotment of lands as herein provided, the said Commission shall, from time to time, and as early as practicable, forward to the Secretary of the Interior lists upon which shall be placed the names of those persons found by the Commission to be entitled to enrollment. The lists thus prepared, when approved by the Secretary of the Interior, shall constitute a part and parcel of the final roll of citizens of the Cherokee tribe, upon which allotment of lands and distribution of other tribal property shall be made. When there shall have been submitted to and approved by the Secretary of the Interior lists embracing the names of all those lawfully entitled to enrollment, the roll shall be deemed complete. The rolls so prepared shall be made in quadruplicate, one to be deposited with the Secretary of the Interior, one with the Commissioner of Indian Affairs, one with the principal chief of the Cherokee Nation, and one to remain with the Commission to the Five Civilized Tribes."

By Section 31, it was provided:

"No person whose name does not appear upon the roll as herein provided shall be entitled to in any manner participate in the distribution of the common property of the Cherokee tribe, and those whose names appear thereon shall participate in the manner set forth in this act."

By Section 20 it was provided:

"If any person whose name appears upon the roll prepared as herein provided shall have died subsequent to the first day of September, 1902, and before receiving his allotment, the lands to which such person would have been entitled if living shall be allotted in his name, and shall, with his proportionate share of other tribal property, descend to his heirs."

That by the Act of April 21, 1904, (33 Stat., 189-204) it was provided that the Commission to the Five Civilized Tribes should conclude its work on or before July 1, 1905, and cease thereafter to exist.

That by the Act of March 3, 1905, (33 Stat., 1048-50) it
8 was provided that the Secretary of the Interior should complete the unfinished business of the Commission to the Five Civilized Tribes and there was conferred on him all the powers heretofore granted to the said commission.

That by the Act of April 26, 1906, (34 Stat., 137), it was provided that no person should be enrolled unless application for enrollment was made prior to December 1, 1905, and the rolls of citizenship were required to be completed by March 4, 1907.

7. That prior to July 2, 1904, the Secretary of the Interior affirmed a decision by the Commission to the Five Civilized Tribes holding that petitioner was entitled to enrollment as a citizen or member by blood of the Cherokee tribe or nation of Indians and after a full and careful inquiry into the right of petitioner and of the record in the case, and without any fraud, concealment or artifice on the part of petitioner as to any matter of fact or law, either pertinent or impertinent or material or immaterial or relevant or irrelevant as to his right to enrollment the name of petitioner was prior to July 2, 1904, duly and regularly ordered placed on the final roll of citizens by blood of the Cherokee Nation and thereafter a final roll of citizens by blood of the Cherokee Nation containing the name of your petitioner as a citizen by blood of the Cherokee Nation was duly and regularly approved by the then lawful incumbent of the office of Secretary of the Interior, the name of your petitioner being duly entered and appearing on the regularly authenticated and approved final rolls of citizens by blood of the Cherokee Nation as follows:

9 *Cherokee Roll, by Blood.*

| No. | Name. | Age. | Sex. | Blood. | Cen. card. | No. |
|---|---|---|---|---|---|---|
| * * | * * * * * | * | * * | * * | * | |
| 31957 | Allison, George A. | 21 | M | 1/16 | | |

(The * marks indicating other names were on said roll).

That said final roll was, on, to wit, the 2nd day of July, 1904, duly and regularly approved by the then lawful incumbent of the office of the Secretary of the Interior as is evidenced by the following genuine and regular notation at the bottom of said approved final roll:

Department of the Interior,
Washington, D. C., July 2, 1904.
Approved:
E. A. HITCHCOCK, *Secretary.*
L. R. S.

That petitioner's enrollment was approved under rules, regulations, custom and practice whereby notice was given of all steps affecting rights of parties with opportunity afforded for appeals and motions for rehearing and review by petitioner or the Cherokee Nation.

8. That prior to the time when, as will appear hereinafter, your petitioner's name was stricken from or attempted to be stricken from the final rolls of citizens by blood of the Cherokee Nation, without notice, as will appear hereinafter, your petitioner duly and regularly selected an allotment of 120 acres of average allottable

lands of the Cherokee Nation and after the name of your
10 petitioner had been duly and regularly placed on the final approved rolls of the citizens by blood of the Cherokee Nation an allotment certificate was duly and regularly issued to your petitioner for the lands so selected by him by the Commission to the Five Civilized Tribes and is now held by him as conclusive evidence of the right of your petitioner to the lands so selected by him and described in the allotment certificate aforesaid. That the statutes made and provided under which your petitioner selected the allotment referred to and an allotment certificate was issued to him provide:

Act of July 1, 1902.

"SECTION 11. There shall be allotted by the Commission to the Five Civilized Tribes and to each citizen of the Cherokee tribe, as soon as practicable after the approval by the Secretary of the Interior of his enrollment as herein provided, land equal in value to one hundred and ten acres of the average allottable lands of the Cherokee Nation, to conform as nearly as may be to the areas and boundaries established by the Government survey, which land may be selected by each allottee so as to include his improvements.

"SECTION 13. Each member of said tribe shall, at the time of the selection of his allotment, designate as a homestead out of said allotment land equal in value to forty acres of the average allottable lands of the Cherokee Nation, as nearly as may be, which shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of the certificate of allotment. Separate certificate shall issue for said homestead. During the time said homestead is held by the allottee the same shall be non-taxable and shall not be liable for any debt contracted by the owner thereof while so held by him.

"SECTION 14. Lands allotted to citizens shall not in any manner whatever or at any time be encumbered, taken, or sold to secure or satisfy any debt or obligation, or be alienated by the allottee or his heirs, before the expiration of five years from the date of the ratification of this Act.

"SECTION 15. All lands allotted to the members of said tribe, except such land as is set aside to each for a homestead as
11 herein provided, shall be alienable in five years after issuance of patent.

"SECTION 16. If for any reason an allotment should not be selected or a homestead designated by or on behalf of any member of the tribe, it shall be the duty of said Commission to make said selection and designation.

"SECTION 21. Allotment certificates issued by the Dawes Commission shall be conclusive evidence of the right of an allottee to the tract of land described therein, and the United States Indian agent for the Union Agency shall, under the direction of the Secretary of the Interior, upon the application of the allottee, place him in possession of his allotment, and shall remove therefrom all persons objectionable to him, and the acts of the Indian agent hereunder shall not be controlled by the writ or process of any court.

"SECTION 22. Exclusive jurisdiction is hereby conferred upon the Commission to the Five Civilized Tribes, under the direction of the Secretary of the Interior, to determine all matters relative to the appraisement and the allotment of lands."

9. That after the issuance to petitioner of said allotment certificate, the Secretary of the Interior, Ethan A. Hitchcock, predecessor in office of respondent as such Secretary of the Interior, arbitrarily, illegally and without notice of any kind whatsoever to your petitioner, who has only just learned what is now alleged to have taken place, undertook to deprive your petitioner of the rights by law vested in him and issued an order, which order, however, your petitioner alleges was inadequate for the purpose even had the Secretary of the Interior lawful right and power so to do, which lawful right and power your petitioner denies, under which your petitioner's name, on some date to your petitioner unknown, though the same was subsequent to the issuance of an allotment certificate to your petitioner by the Commission to the Five Civilized Tribes,

12 was stricken or attempted to be stricken from the aforsaid final approved rolls of the citizens by blood of the Cherokee Nation by the mutilation of said rolls as follows: a line drawn through your petitioner's name thus [Allison, George A.]* and the writing after said name of the following: "See 23,105—1907." That your petitioner is informed and believes that this action was taken upon the supposed theory that your petitoner came within, as to his rights as a citizen of the Cherokee Nation, an opinion rendered in the month of February, 1907, by the Attorney-General of the United States in some case to which your petitoner was not a party, either directly or indirectly, personally or by representation, and in which your petitioner had no hearing or right to be heard with the result to deprive your petitioner unless he be protected by this honorable court of his vested right to a share in the lands and funds of the Cherokee Nation without due process of law as guaranteed to your petitioner by the Constitution and laws of the United States and also by the Constitution and laws of the Cherokee Nation.

Your petitioner on information and belief further alleges that the respondent herein has cancelled the allotment of your petitioner herein referred to and has permitted other persons to file on the lands of your petitioner as allotments of said other persons and your petitioner's title and rights to the lands to be thereby impaired and as your petitioner is further advised purposes to permit without the consent of your petitioner drilling for oil to take place on the

13 allotment of your petitioner whose lands thereby will be drained of any oil thereon to the permanent and lasting injury of your complainant.

Your petitioner on information and belief avers the changes set forth above in the rolls were not noted prior to March 4, 1907, on all five of the rolls required by law to be made and deposited as provided by the Act of July 1, 1902, *supra*, and demands that resond-

[* Words enclosed in brackets erased in copy.]

ent state on which of said rolls these changes were noted prior to March 4th, last. Your petitioner further avers that since March 4, 1907, the said rolls, contrary to law, have been further changed and mutilated by writing in red ink above your petitioner's name on said rolls the following: "Cancelled M'ch 4, 1907."

10. Petitioner on information and belief avers that the true present value of the allotment selected by him and to which he has been issued an allotment certificate and of his share in the funds and in the surplus lands of the Cherokee Nation after all lawful members have been given their lawful share therein is in excess of five thousand dollars.

11. Your petitioner further states that he has made demand on the respondent as Secretary of the Interior that he cause the line run through petitioner's name to be erased and the notation placed opposite and above the name of your petitioner to be erased and to restore your petitioner to the rolls of citizens by blood of the Cherokee Nation as fully as he was thereupon prior to the hereinbefore mentioned illegal and arbitrary act of respondent's predecessor in office in striking or attempting to strike petitioner's name
14 therefrom and to refuse to permit other persons to file on the same as part of their allotment or to drill for oil thereon without your petitioner's assent and authority, but respondent has refused and neglected so to do, and on the contrary, as your petitioner is informed and believes, holds that petitioner is not an enrolled member or citizen of the Cherokee Nation nor entitled to share in its lands and funds and will be required to surrender the land allotted to him to any others who may legally file thereon and to permit the same to be denuded of any oil therein.

Wherefore, inasmuch as the Honorable James Rudolph Garfield, Secretary of the Interior, has refused to restore your petitioner to the approved rolls of members or citizens by blood of the Cherokee Nation, to remove the cloud placed by his predecessor in office on your petitioner's rights, claims and demands as an enrolled citizen or member of the Cherokee Nation to recognize your petitioner as a lawfully enrolled citizen or member of said nation, and to refuse to permit other persons to take the lands of your petitioner in allotment and to drill for oil therein without your petitioner's authority and as the law provides no other adequate remedy in the premises whereby your petitioner can be protected in his lawful rights whereof he is now unjustly and arbitrarily deprived, your petitioner prays.

1. That a writ of mandamus may be issued and directed to the Honorable James Rudolph Garfield, Secretary of the Interior, commanding him to erase or cause to be erased the marks or notations made on the approved rolls of the members by blood of the
15 Cherokee Nation in derogation of your petitioner's rights or claims as a duly and lawfully enrolled citizen or member by blood of said nation, to restore your petitioner to full and lawful enrollment as a citizen or member by blood in said Cherokee Nation, to recognize your petitioner as a lawful citizen or member by blood of said Cherokee Nation with all the rights and privileges thereun-

to appertaining and to refuse to permit any other person to take or hold in allotment the lands allotted to your petitioner or to drill for oil thereon without your petitioner's authority.

2. For such other and further right or rights or relief as to the Court may seem proper and the nature of your petitioner's case may require.

And as in duty bound, your petitioner will ever pray.

GEORGE A. ALLISON, *Petitioner.*

DISTRICT OF COLUMBIA, *ss:*

Before the subscriber, a Notary Public in and for the District of Columbia, on the 10th day of May, A. D. 1907, personally appeared Chas. H. Merillat, who made oath on the Holy Evangels of Almighty God that he is the attorney of George A. Allison, the within petitioner, and is authorized by him to institute these proceedings; that he has read the petition subscribed and that the facts as set forth in said petition are true to the best of deponent's knowledge and belief.

CHARLES H. MERILLAT.

16 Subscribed and sworn to before me this 10 day of May, A. D. 1907.

J. R. YOUNG, *Clerk,*
By ALF. G. BUHRMAN, *Ass't Clk.*

*Rule to Show Cause.*

Filed May 10, 1907.

In the Supreme Court of the District of Columbia.

Law. No. 49435.

THE UNITED STATES OF AMERICA *ex Rel.* GEORGE A. ALLISON,
Petitioner,
*vs.*
JAMES R. GARFIELD, Secretary of the Interior, Respondent.

On consideration of the petition filed herein on the 10th day of May, 1907, it is by the Court this 10th day of May 1907, ordered that the Respondent show cause on or before the 17th day of May, 1907, why the writ of mandamus should not issue as prayed.

WRIGHT, *Justice.*

*Marshal's Return.*

Served copy of the within rule and copy of the petition in this cause, on James R. Garfield, Secretary of the Interior.

May 11, 1907.

AULICK PALMER, *Marshal.*
S.

17 *Answer.*

Filed June 4, 1907.

In the Supreme Court of the District of Columbia.

At Law. No. 49435.

THE UNITED STATES *ex Rel.* GEORGE A. ALLISON, Petitioner,
*vs.*
JAMES RUDOLPH GARFIELD, Secretary of the Interior, Respondent.

The respondent, for answer to the rule to show cause why a writ of mandamus should not issue against him as prayed in the petition and to said petition, says:

1. That he does not admit that petitioner is a citizen of the United States or a member of the Cherokee Nation and a Cherokee by blood.

2. Respondent admits that he is a citizen of the United States, temporarily residing in the District of Columbia, and that he succeeded Ethan A. Hitchcock as Secretary of the Interior on March 5, 1907.

3. Respondent admits that, under the laws of Congress and the agreements with the Cherokee Nation it was the province and duty of his predecessor, as Secretary of the Interior, to take final action upon the applications of persons to be enrolled as members of the Five Civilized Tribes in the Indian Territory, as provided by law, including the Cherokee Nation.

Respondent further says that by the act of July 1, 1902
18 (32 Stat., 716, sec. 22), exclusive jurisdiction of all matters relating to the allotment of lands in said Nation was conferred upon the Commission to the Five Civilized Tribes, under the direction of the Secretary of the Interior, and that by the act of March 3, 1905 (33 Stat., 1048, 1060), such jurisdiction was devolved exclusively upon the Secretary of the Interior.

4. Respondent admits that the lands occupied by the Cherokee Nation in the Indian Territory were granted and secured to said nation by the treaties referred to in the fourth paragraph of the petition.

5. Respondent admits that said nation has not become extinct or abandoned said lands, but does not admit that petitioner is a member of the Cherokee Nation, and denies that he has acquired a vested right to any specific tract or allotment of land in said nation, or that he is duly enrolled as a member of said nation upon the rolls prepared by the Commission to the Five Civilized Tribes and the Secretary of the Interior as provided by law, and thereby entitled to a distributive share in the funds and surplus lands of said nation.

6. Respondent admits that provision was made for the enrollment of members of the Five Civilized Tribes in the Indian Territory for the purpose of allotting the lands of said nations in severalty, as set forth in the several acts referred to in the sixth paragraph of the petition.

7. Respondent admits that petitioner was enrolled as a
19 member by blood of the Cherokee Nation upon a partial list of such members approved as set out in paragraph seven of the bill, but avers that thereafter and prior to the time fixed by Congress for the completion of the rolls of members of said nation, the Secretary of the Interior disapproved the enrollment of petitioner and struck his name from said rolls, as set out in paragraph 9 of this answer.

8. Respondent admits that a certificate of allotment was issued to petitioner by the Commission to the Five Civilized Tribes on May 14, 1904, for certain lands selected by him, and that a patent has been issued and recorded therefor.

9. Respondent says that the name of petitioner was stricken from the partial list of members of the Cherokee Nation prepared and approved as aforesaid, by order of his predecessor as Secretary of the Interior, on March 4, 1907, prior to the expiration of the time fixed by the act of April 26, 1907 (34 Stat., 137), for the completion of the rolls of said nation, and a notation thereof made upon the copy of said list in his possession and petitioner's name lined out thereon on the same day, as appears from the copies of the records of the Interior Department marked Exhibits A, B and C hereto attached and made a part hereof, and that petitioner's name was lined out upon the other four copies of said list in pursuance of said order of his predecessor after March 4, 1907, one of said copies being in the possession of the Commissioner of Indian Affairs and the other three in the possession of the Commissioner to the Five Civilized Tribes.

Respondent further says that the words "328 p. c. 258,"
20 after the words "Cancelled March 4 07" on his copy of said list refer to the number and page of the press copy book into which was copied the letter of his predecessor of March 4, 1907, striking the name of petitioner from the rolls.

And respondent avers that the action of his predecessor in striking the name of petitioner from the approved rolls of members of the Cherokee Nation, as aforesaid, was in accordance with his long established practice, extending from the time that the act of July 1, 1902 (32 Stat., 716) went into effect until the present time, during which time his predecessor, as the approved rolls of the Five Civilized Tribes in respondent's possession show, struck several hundred names from said rolls because, in his judgment, they were improperly enrolled [, and that Congress has recognized and sanctioned such practice.]*

Respondent says that there was no rule or regulation requiring the giving of notice in such cases. As to the matter of notice, respondent says that, as he is advised and believes, his predecessor at first exercised the right to strike names from approved lists of members of the Five Civilized Tribes, prior to the time fixed for the completion of the rolls, when in his judgment they were improperly and unlawfully enrolled, without notice to the party concerned, but that for about three years, prior to March 4, 1907, the date fixed by the

[*Words enclosed in brackets erased with red ink in copy.]

act of Congress of April 26, 1907, for the completion of the rolls, it had been the custom or practice of his predecessor to give notice in such cases and afford the party concerned an opportunity to be heard, but respondent says that, owing to the limited time
21 in which his predecessor had to act before the expiration of the time fixed for completing the rolls, it was impossible to give notice and opportunity to be heard in the case of this petitioner and a large number of other persons whose right to be enrolled was believed by his predecessor to be adversely affected by the principles announced in an opinion rendered his predecessor by the Attorney General on February 19, 1907, in the case of certain other persons who had been enrolled as members of the Choctaw Nation for allotment purposes, and who were stricken from the rolls by his predecessor in consequence of that opinion.

10. Respondent says that he is not advised as to the value of the lands or moneys claimed by petitioner.

11. Respondent admits that petitioner made demand that respondent restore petitioner to said roll and that he refused so to do.

Further answering respondent says that by the act of Congress of April 26, 1907 (34 Stat., 137), the rolls of members of the Cherokee Nation were required to be fully completed on or before March 4, 1907, and the Secretary of the Interior was deprived of jurisdiction to approve the enrollment of any person after that date.

Respondent further says that petitioner applied in 1896 to the Commissioner to the Five Civilized Tribes to be admitted and enrolled as a citizen of the Cherokee Nation under the act of June 10, 1896 (29 Stat., 329), and his application was denied; that no appeal was taken by him from such judgment to the United States
22 Courts for the Indian Territory, as provided in that act, whereby such judgment became final, and that thereafter the Commissioner to the Five Civilized Tribes and Secretary of the Interior had no jurisdiction or authority to enroll petitioner.

Respondent further says that the matters sought to be controlled by the petition relate to the allotment of land in severalty in the Cherokee Nation, and that by the legislation of Congress exclusive jurisdiction of all matters relating to the allotment of lands in severalty in said nation has been conferred upon the Secretary of the Interior.

Respondent further says that the matters sought to be controlled by the petition involve the exercise of judgment and discretion on the part of the Secretary of the Interior.

Wherefore respondent prays that the rule against him be discharged and the petition dismissed at the cost of petitioner.

JAMES RUDOLPH GARFIELD,
*Secretary of the Interior.*

EDWARD T. SANFORD,
*Assistant Attorney-General.*
WILLIAM R. HARR,
*Special Assistant to Attorney-General.*

UNITED STATES OF AMERICA, *District of Columbia, ss:*

James Rudolph Garfield, being duly sworn, deposes and
23 says: That he is the respondent in the above entitled cause; that he has read the foregoing answer and know- the contents thereof, and that the same is true to the best of his knowledge and belief.

JAMES RUDOLPH GARFIELD.

Subscribed and sworn to before me this 4th day of June, 1907.

[SEAL.] EDW'D B. FOX,
*Notary Public, D. C.*

24 (Copy.) EXHIBIT "A."

Filed June 4, 1907.

I. T. D. 6920-1907. L. R. S. *Direct.*

DEPARTMENT OF THE INTERIOR, WASHINGTON, *March* 4, 1907.

Y. P. L. L. B.

Commissioner to the Five Civilized Tribes, Muskogee, Indian Territory.

SIR: In accordance with the recommendation contained in your letter of February 27, 1907, relative to names to be stricken from the partial roll of Cherokee citizens, and Indian Office letter of March 2, 1907, and referring to Departmental letter of even date upon a similar report by you, relative to the names of persons to be stricken from the partial rolls of the Choctaw and Chickasaw nations, the names of the persons mentioned below have been stricken from the partial rolls of citizens of the Cherokee Nation, opposite the numbers mentioned:

31910 Allison, John.
31956 Allison, Ida B.
31957 Allison, George A. Patent recorded.
31958 Allison, Elmer C.
31959 Allison, Jasper P. Patent recorded.
31960 Allison, Johnnie S.
31961 Allison, Frankie P. Patent recorded.

If by inadvertence the name of anyone has been left on any partial roll of the Cherokee Nation after decision adverse to him was made by the Department prior to March 5, 1907, and since the opinion of the Attorney-General referred to, the name of such person will be stricken from the roll as of this date.

A carbon copy hereof has been sent to the Indian Office.

Respectfully,

(Signed) E. A. HITCHCOCK, *Secretary.*

25 (Copy.) EXHIBIT "B."

Filed June 4, 1907.

DEPARTMENT OF THE INTERIOR.

Commissioner to the Five Civilized Tribes.

Direct.

MUSKOGEE, INDIAN TERRITORY, *February* 27, 1907.

The Honorable Secretary of the Interior.

SIR: I am in receipt of Departmental telegram of February 23, 1907, directing me to inspect the approved rolls of citizens of the Cherokee Nation to determine what persons have been enrolled thereon contrary to the views expressed by the Attorney-General in his opinion of February 19, 1907, and whose names should be stricken therefrom, and also directing me to furnish the Department with a list of such names, with their roll numbers, and such information as will permit of its being determined whether such names should be stricken from the rolls. I am also in receipt of Departmental letter of same date (I. T. D. 4564-1907), confirming said telegram.

In reply thereto, here follows a list of the persons whose names appear upon the final approved rolls of the Cherokee Nation whose right to enrollment is adversely affected by the opinion of the Attorney General of February 19, 1907, and in the opinion of this office the names should, if the opinion of the Attorney General is to be followed in all cases, be stricken from the final roll of citizens
26 of the Cherokee Nation, as their names appear thereon opposite the numbers indicated.

Sufficient data accompanies each case referred to to indicate reasons for the above recommendation.

31910 Allison, John.
31956 Allison, Ida B.
31957 Allison, George A. Patent recorded.
31958 Allison, Elmer C.
31959 Allison, Jasper P. Patent recorded.
31960 Allison, Johnnie S.
31961 Allison, Frankie P. Patent recorded.

Of the above named persons application was made to the Commission to the Five Civilized Tribes for the admission to citizenship in the Cherokee Nation, under the provisions of the Act of Congress approved June 10, 1896 (29 Stat., 321), for John Allison, Ida B. Allison, George A. Allison, Elmer C. Allison, and Jasper P. Allison; their application was denied by the Commission and no appeal was taken therefrom.

The decision of the Commission to the Five Civilized Tribes granting the application of John Allison for enrollment as a citizen by blood of the Cherokee Nation was affirmed by the Department April 11, 1904 (I. T. D. 9038-1903-2866-1904). The decision of

the Commission to the Five Civilized Tribes granting the application for the enrollment of the other above named persons as citizens by blood of the Cherokee Nation, was affirmed by the De-
27 partment April 16, 1904 (I. T. D. 2868-1904).

Johnnie S. Allison and Frankie P. Allison are minor children of Jasper P. Allison, were born since the decision of the Commission under the Act of June 10, 1896, and possess no right to enrollment as citizens of the Cherokee Nation, other than as descendants of their said father.

The mother of these persons, other than Johnnie S. and Frankie P. Allison, was Margaret Allison, now deceased, who was admitted to citizenship in the Cherokee Nation under an Act of the Cherokee National Council approved December 8, 1894, conditioned upon her removal to the Cherokee Nation within six months from the approval of said Act. The records in these cases show that she complied with the requirements of the Act. Her said children were minors when she was admitted to citizenship, and they removed to and settled in the Cherokee Nation in 1894.

The records of this office further show that said Margaret Allison applied to the Commission to the Five Civilized Tribes for admission to citizenship in the Cherokee Nation, under said Act of June 10, 1896, and that her application was also denied by the Commission.

The status of the persons whose names appear in the above list as citizens of the Cherokee Nation, remains unchanged since 1896 except as above noted.

In the above list in all cases where patents have been recorded in the Office of the Commissioner to the Five Civilized Tribes, notation has been made to that effect. Where no notation relative to
28 patents appears it indicates that no patents to any allotment selected which may have been made by the person affected, has been recorded.

Those persons enrolled in the Choctaw, Chickasaw, and Creek Nations, whose right to enrollment is adversely affected by the opinion of the Attorney General of February 19, 1907, heretofore referred to, will be made *and* the subjects of separate communications of this date.

Respectfully,

(Signed) TAMS BIXBY, *Commissioner.*

L. M. B.

29 EXHIBIT "C."

Filed June 4, 1907.

*Cherokee Roll, Indians by Blood.*

| No. | Name. | Age. | Sex. | Blood. | Census card. |
|---|---|---|---|---|---|
| ..... | ..... | ..... | ..... | ..... | ..... |
| | Cancelled March 4, 1907, 328 p. c. 258. | | | | |
| [31910 | Allison, John..... | 27 | M | 1/32 | 10778]* |
| ..... | ..... | ..... | ..... | ..... | ..... |
| | Cancelled March 4, 1907, 328 p. c. 258. | | | | |
| [31956 | Allison, Ida B..... | 19 | F | 1/16 | 5091]* |
| | Cancelled March 4, 1907, 328 p. c. 258. | | | | |
| [31957 | Allison, George A..... | 21 | M | 1/16 | 5094]* |
| | Cancelled March 4, 1907, 328 p. c. 258. | | | | |
| [31958 | Allison, Elmer C..... | 17 | M | 1/16 | 5094]* |
| | Cancelled March 4, 1907, 328 p. c. 258. | | | | |
| [31959 | Allison, Jasper P..... | 25 | M | 1/16 | 5094]* |
| | Cancelled March 4, 1907, 328 p. c. 258. | | | | |
| [31960 | Allison, Johnnie S..... | 3 | M | 1/32 | 5095]* |
| | Cancelled March 4, 1907, 328 p. c. 258. | | | | |
| [31961 | Allison, Frankie P..... ... | 1 | M | 1/32 | 5095]* |
| ..... | ..... | ..... | ..... | ..... | ..... |

Department of the Interior,
Washington, D. C., July 2, 1904.
L. R. S.

Approved
E. A. HITCHCOCK, *Secretary.*

30 *Demurrer.*

Filed June 6, 1907.

In the Supreme Court of the District of Columbia.

At Law. No. 49435.

THE UNITED STATES *ex Rel.* GEORGE H. ALLISON, Petitioner,
*vs.*
JAMES RUDOLPH GARFIELD, Secretary of the Interior, Respondent.

The petitioner says that the answer filed by respondent in the above entitled cause is bad in substance.

JAMES K. JONES,
KAPPLER & MERILLAT,
*Attorneys for Petitioner.*

[* Words and figures enclosed in brackets erased in copy.]

NOTE.—One matter to be argued on demurrer is that the answer sets forth no sufficient reason in law for the cancellation by the Secretary of the Interior without notice of the enrollment of petitioner duly and regularly ordered.

31 Supreme Court of the District of Columbia.

FRIDAY, *August 2d*, 1907.

Session resumed pursuant to adjournment, Mr. Justice Barnard, presiding.

* * * * * * *

By Justice Wright.

At Law. No. 49435.

THE UNITED STATES OF AMERICA *ex Rel.* GEORGE A. ALLISON, Petitioner,

*vs.*

JAMES RUDOLPH GARFIELD, Secretary of the Interior, Respondent.

Upon hearing the petitioner's demurrer to the answer of the Respondent herein, it is considered that said demurrer be and the same is hereby sustained and the Respondent by his Attorney says he will stand upon his answer: Thereupon, the Court being fully advised, it is considered, ordered and adjudged that the Respondent James Rudolph Garfield, be, and he is hereby commanded within twenty days after this date to restore the name of the Relator to the rolls of members or citizens of the Chickasaw Tribe or Nation, to erase from said rolls the statements placed thereon derogatory to Relator's rights in said tribe of said Chickasaw Tribe and to recognize Relator as an enrolled member of said tribe.

The Respondent thereupon in open Court by counsel excepted to the judgment so rendered and prayed an appeal from the
32 judgment of this Court to the Court of Appeals of the District of Columbia, which was allowed, and pending such appeal the judgment is stayed and no writ shall issue thereon against the Respondent.

*Order Extending Time for Filing Transcript of Record.*

Filed September 18, 1907.

In the Supreme Court of the District of Columbia.

At Law. No. 49435.

THE UNITED STATES OF AMERICA *ex Rel.* GEORGE A. ALLISON

*vs.*

JAMES RUDOLPH GARFIELD, Secretary of the Interior.

The time for producing and filing with the Clerk of the Court of Appeals the transcript of record in the above-entitled cause, is hereby extended to and including the 15th day of October, A. D. 1907.

HARRY M. CLABAUGH,
*Chief Justice.*

33 *Directions to Clerk for Preparation of Transcript of Record.*

Filed September 25, 1907.

In the Supreme Court of the District of Columbia.

At Law. No. 49435.

THE UNITED STATES *ex Rel.* GEORGE A. ALLISON, Petitioner,
*vs.*
JAMES RUDOLPH GARFIELD, Secretary of the Interior.

In preparing the transcript of the record in this case for the Court of Appeals the Clerk will please copy:

1. Petition (including Exhibits) and rule to show cause.
2. Answer (including Exhibits), inserting amendment to paragraph nine at end of that paragraph and omitting all orders in regard to amendments.
3. Demurrer to Answer.
4. Order sustaining demurrer and allowing appeal and supersedeas—Minutes 49, p. 386.
5. Order extending time to file Transcript of Record.

EDWARD T. SANFORD,
WILLIAM R. HARR,
*Attorneys for Respondent.*

34 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 33, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 49435 At Law, wherein The United States of America, *ex relatione* George A. Allison, is Petitioner, and James Rudolph Garfield, Secretary of the Interior is Respondent, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the city of Washington, in said District, this 14th day of October, A. D. 1907.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1839. James Rudolph Garfield, Secretary of the Interior, appellant, *vs.* The United States of America *ex rel.* George A. Allison. Court of Appeals, District of Columbia. Filed Oct. 14, 1907. Henry W. Hodges, clerk.

20 WEDNESDAY, *November 6th, A. D. 1907.*

JAMES RUDOLPH GARFIELD, SECRETARY of the Interior, Appellant, *vs.* THE UNITED STATES OF AMERICA, EX relatione John E. Goldsby. } No. 1829.

JAMES RUDOLPH GARFIELD, SECRETARY of the Interior, Appellant, *vs.* THE UNITED STATES OF AMERICA, EX rel. Ida Allison. } No. 1838.

and

JAMES RUDOLPH GARFIELD, SECRETARY of the Interior, Appellant, *vs.* THE UNITED STATES OF AMERICA, EX rel. George A. Allison. } No. 1839.

The argument in the above-entitled causes was commenced by Mr. Edward T. Sanford, attorney for the appellant, and was continued by Mr. C. H. Merillat, attorney for the appellees, and was concluded by Mr. Wm. R. Harr, attorney for the appellant.

21 In the Court of Appeals of the District of Columbia.

JAMES RUDOLPH GARFIELD, SECRETARY of the Interior, Appellant, *vs.* THE UNITED STATES OF AMERICA, EX rel. John E. Goldsby, Appellee. } No. 1829.

JAMES RUDOLPH GARFIELD, SECRETARY of the Interior, appellant, *vs.* THE UNITED STATES OF AMERICA, EX rel. Ida B. Allison, Appellee. } No. 1838.

JAMES RUDOLPH GARFIELD, SECRETARY of the Interior, Appellant, *vs.* THE UNITED STATES OF AMERICA, EX rel. George A. Allison, Appellee. } No. 1839.

*Stipulation.*

It is hereby stipulated between the parties hereto that these causes are submitted on the printed record and briefs and the argument heretofore made to the justices who sat in the above-entitled causes, exclusive of the late Associate Justice McComas, namely, Mr. Chief Justice Shepard and Mr. Justice Barnard; provided, however, that if the remaining justices shall be divided in opinion, the several causes shall not be affirmed by a divided court, but shall be assigned for reargument.

EDWARD T. SANFORD,
*Asst. Atty. Gen.*
WILLIAM R. HARR,
*Attorneys for Appellant.*
KAPPLER & MERILLAT,
Per CHAS. H. MERILLAT,
*Attorneys for Appellees.*

22 (Endorsed:) Nos. 1829, 1838 & 1839. Garfield *v.* U. S. ex rel. Goldsby; Garfield *v.* U. S. ex rel. Allison; Garfield *v.* U. S. ex rel. Allison. Stipulation to submit case on records and briefs to the Chief Justice and Justice Barnard. Court of Appeals, District of Columbia, filed November 19, 1907. Henry W. Hodges, clerk.

23 JAMES RUDOLPH GARFIELD, SECRETARY of the Interior, Appellant,
*vs.*
THE UNITED STATES OF AMERICA, ex rel. George A. Allison. } No. 1839.

*Opinion.*

(Mr. Chief Justice Shepard deliever the opinion of the court:)

This is an appeal from an order of the Supreme Court of the District of Columbia directing the Secretary of the Interior to erase the marks of cancellation of the name of relator from the list of approved members of the Cherokee Nation, and to restore his name to the approved roll.

This case was argued and submitted with that of Garfield *v.* U. S. ex rel. Goldsby. While Goldsby is a member of the Chickasaw Nation, and the relator of the Cherokee Nation, the statutes relating to the allotment of lands, enrollment of members, and distribution of tribal funds among both nations are substantially the same, in so far as pertinent to the facts of each case. These facts are substantially the same, with the exception that the relator, in this case, is an enrolled member of the Cherokee Nation, and that he has heretofore received the patent conveying title to the land allotted to him as an enrolled and approved member of his nation.

For the reasons given at length in the opinion in Goldsby's case, the order appealed from will be affirmed with costs. It is so ordered.

Affirmed.

FRIDAY, *November 29th, A. D. 1907.*

| | |
|---|---|
| JAMES RUDOLPH GARFIELD, SECRETARY of the Interior, Appellant, *vs.* THE UNITED STATES OF AMERICA, ex rel. George A. Allison. | No. 1839. October term 1907. |

Appeal from the Supreme Court of the District of Columbia. This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said Supreme Court in this cause be, and the same is hereby, affirmed with costs.

Per Mr. Chief Justice SHEPARD.

NOVEMBER 29, 1907.

MONDAY, *January 6th, A. D. 1908.*

| | |
|---|---|
| JAMES RUDOLPH GARFIELD, SECRETARY of the Interior, Appellant, *vs.* THE UNITED STATES OF AMERICA, ex rel. George A. Allison. | No. 1839. |

On motion of Mr. W. R. Harr, of counsel for the appellant, it is ordered by the court that a writ of error to remove this cause to the Supreme Court of the United States issue. And it is further ordered that the mandate in said cause be, and the same is hereby, stayed until further order.

26 UNITED STATES OF AMERICA, *ss:*

*The President of the United States to the honorable the justices of the Court of Appeals of the District of Columbia, greeting:*

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between James Rudolph Garfield, Secretary of the Interior, Appellant, and the United States of America ex rel. George A. Allison, Appellee, a manifest error hath happened, to the great damage of the said appellant, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 6th day of January, in the year of our Lord one thousand nine hundred and eight.

[SEAL.] HENRY W. HODGES,
*Clerk of the Court of Appeals of the District of Columbia.*

Allowed by

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27 UNITED STATES OF AMERICA, *ss:*

*To the United States of America ex rel. George A. Allison, greeting:*

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein James Rudolph Garfield, Secretary of the Interior, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard, Chief Justice of the Court of Appeals of the District of Columbia, this 6th day of January, in the year of our Lord one thousand nine hundred and eight.

SETH SHEPARD,
*Chief Justice of the Court of Appeals of the District of Columbia.*

Service accepted this 6th day of January, A. D. 1908.

CHARLES H. MERILLAT.

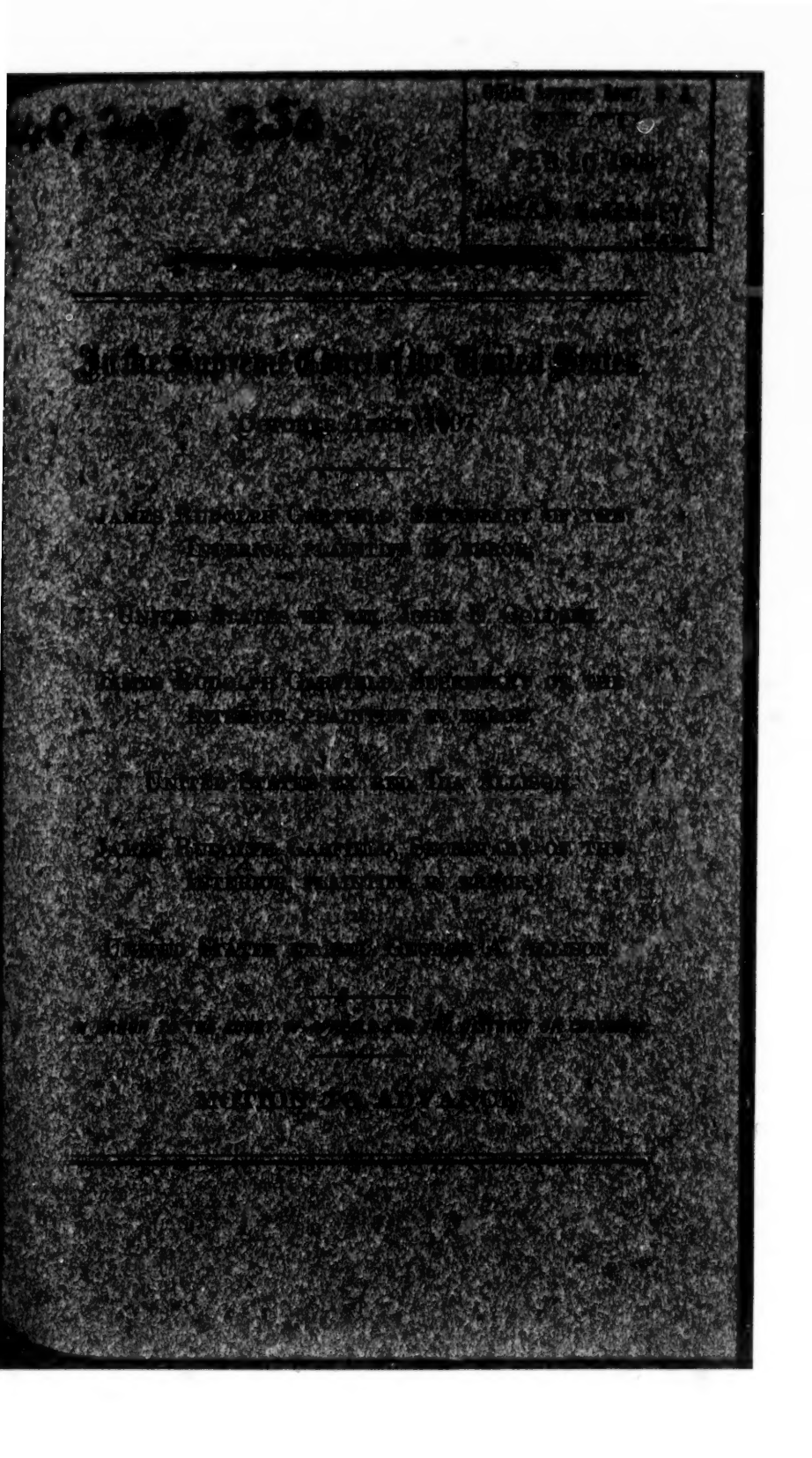
28 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 27, inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of James Rudolph Garfield, Secretary of the Interior, Appellant, *vs.* The United States of America ex rel. George A. Allison, No. 1839, January term, 1908, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 11th day of January, A. D. 1908.

[SEAL.] HENRY W. HODGES.
*Clerk of the Court of Appeals of the District of Columbia.*

(Indorsement on cover:) File No. 20977. District of Columbia, Court of Appeals. Term No. 574. James Rudolph Garfield, Secretary of the Interior, Plaintiff in Error, *vs.* The United States of America ex rel. George A. Allison. Filed January 17th, 1908. File No. 20977.



# In the Supreme Court of the United States.

OCTOBER TERM, 1907.

| | |
|---|---|
| JAMES RUDOLPH GARFIELD, SECRETARY OF the Interior, plaintiff in error, *v.* UNITED STATES EX REL. JOHN E. GOLDSBY. | No. 572. |
| JAMES RUDOLPH GARFIELD, SECRETARY OF the Interior, plaintiff in error, *v.* UNITED STATES EX REL. IDA ALLISON. | No. 573. |
| JAMES RUDOLPH GARFIELD, SECRETARY OF the Interior, plaintiff in error, *v.* UNITED STATES EX REL. GEORGE A. ALLISON. | No. 574. |

*IN ERROR TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.*

## MOTION TO ADVANCE.

Comes now the Solicitor-General, on behalf of plaintiff in error, and moves the court to advance the above-entitled cases for hearing during the present term, if possible.

These cases are similar in their nature and involve matters relating to the allotment of lands in severalty in the Five Civilized Tribes in the Indian Territory. They present two questions of considerable

gravity and importance. (1) As to the jurisdiction of the courts of the District of Columbia to control the action of the Secretary of the Interior in these allotment matters; and (2) if such jurisdiction exists, as to the authority of the Secretary of the Interior to correct the approved rolls of members of said tribes upon which allotments and distribution of tribal property are made, within the time fixed by law for the completion of the same, to wit, prior to the close of March 4, 1907.

Acting under the belief that he had the authority to correct said rolls within the time fixed for the completion of the same, the predecessor of the present Secretary of the Interior struck several hundred names from said rolls because they were, in his judgment, unlawfully or improperly enrolled, and, in some instances, because their enrollment had been procured by fraud.

The present suits are but the forerunners of many similar actions which have been or may be filed in the courts of the District by or on behalf of the persons so stricken from the approved rolls of the Five Civilized Tribes. Nearly a hundred such persons have already brought suit. The property interests involved are very large and probably amount to $1,000,000 or more, as each allotment is valued at not less than $5,000.

Pending the determination of the questions involved in these suits, the work of completing the allotment of lands and distribution of the other

property of the Five Civilized Tribes must necessarily be delayed, to the great embarrassment not only of the Department of the Interior, but of the several tribes and the particular individuals concerned.

For these reasons an early determination of the cases is requested. Opposing counsel concur in moving their advancement.

Respectfully,

HENRY M. HOYT,
*Solicitor-General.*

○

Supreme Court, U. S.
FILED
OCT 8 1908
JAMES H. MCKENNEY,
Clerk.

No. 248.

# In the Supreme Court of the United States.

October Term, 1908.

JAMES RUDOLPH GARFIELD, SECRETARY OF THE INTERIOR, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA ex rel. JOHN E. CHILDERS.

IN ERROR TO THE DISTRICT OF COLUMBIA.

BRIEF FOR PLAINTIFF IN ERROR.

# In the Supreme Court of the United States.

OCTOBER TERM, 1908.

JAMES RUDOLPH GARFIELD, SECRETARY of the Interior, Plaintiff in Error,
*v.*
THE UNITED STATES OF AMERICA EX rel. John E. Goldsby.
No. 248.

*IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.*

## BRIEF FOR PLAINTIFF IN ERROR.

### STATEMENT OF THE CASE.

This was an application to the Supreme Court of the District of Columbia for a writ of mandamus against the appellant, as Secretary of the Interior, to compel him to erase certain marks and notations which had been made upon the approval rolls of members of the Chickasaw Nation in pursuance of an order of his predecessor striking the name of the relator from the rolls, and to restore the relator to enrollment as a citizen or blood member of said nation, with all the rights and privileges thereunto appertaining.

56786—08——1

The petition (R., 1–3) alleged, in substance, that the relator, or petitioner, as he is styled, was a recognized citizen of the Chickasaw Nation, and entitled, as an heir of the nation prior to allotment, to an equal undivided interest in the lands of the Choctaw and Chickasaw nations, and was then the owner and possessed in vested right of an allotment of land in the Chickasaw Nation, and was further entitled to an equal, undivided, distributive share in the funds and surplus lands of said nation after allotments were made to all duly enrolled members.

The petition referred to and set out, in part (R., 3–6), the several acts of Congress relating to the allotment of the lands and the distribution of the funds of the Five Civilized Tribes and authorizing the preparation of rolls of members of said tribes for such purposes, including the act of July 1, 1902 (32 Stat., 641), relating to the preparation of lists of members of the Choctaw and Chickasaw nations, and averred (R., 6) that on or about October 6, 1905, the Secretary of the Interior affirmed a decision by the Commission to the Five Civilized Tribes holding that petitioner and his children were entitled to enrollment, and petitioner's name was ordered placed on a final roll of citizens by blood of the Chickasaw Nation, and that thereafter a list containing their names was prepared in the form of a roll of citizens of the Choctaw and Chickasaw tribes, and said list was approved by the Secretary of the Interior, through his First Assistant, on November 27, 1905, "as part and parcel of the final roll of citizens of the

Choctaw and Chickasaw tribes and as entitling petitioner to an allotment of lands and distribution of tribal property of said tribes."

The petition further averred (R., 7) that thereafter petitioner selected an allotment of 320 acres of average allotable lands of the Chickasaw Nation and an allotment certificate was issued to him by the Commission to the Five Civilized Tribes for the lands so selected, and is now held by him as conclusive evidence of his right thereto.

The petition further averred (R., 8–9):

> 9. That after the issuance to petitioner of said allotment certificate, the then Secretary of the Interior, Ethan A. Hitchcock, predecessor in office of respondent as such Secretary of the Interior, arbitrarily, illegally, and without notice of any kind whatsoever to your petitioner, who has only just learned what is now alleged to have taken place, undertook to deprive your petitioner of the rights by law vested in him and issued an order, which order, however, your petitioner alleges was inadequate for the purpose even had the Secretary of the Interior lawful right and power so to do, which lawful right and power your petitioner denies, under which your petitioner's name, on some date to your petitioner unknown, though the same was subsequent to the issuance of an allotment certificate to your petitioner by the Commission to the Five Civilized Tribes, was stricken or attempted to be stricken from the aforesaid final approved rolls of citizens by blood of the Choctaw and Chickasaw nations by the mutilation of said rolls as follows: A

line drawn through your petitioner's name thus ["Goldsby, John E."][a] and the writing after said name of the following: "See 22,850—1907." Your petitioner on information and belief avers that the changes just described were not noted prior to March 4, 1907, on all five of the rolls required by law to be made and deposited as provided by the act of July 1, 1902. That since the 4th day of March, 1907, there has been written in red ink immediately above the names of your petitioner and his children the words "Canceled March 4, 1907." That your petitioner is informed and believes that this action was taken upon the supposed theory that your petitioner came within, as to his rights as a citizen of the Chickasaw Nation, an opinion rendered in the month of February, 1907, by the Attorney-General of the United States in some case to which your petitioner was not a party, either directly or indirectly, personally or by representation, and in which your petitioner had no hearing or right to be heard, with the result to deprive your petitioner, unless he be protected by this honorable court, of his vested right to a share in the lands and funds of the Choctaw and Chickasaw nations without due process of law as guaranteed to your petitioner by the Constitution and laws of the United States and also by the constitution and laws of the Choctaw and Chickasaw nations.

The petition then alleged (R., 9) demand upon the present Secretary of the Interior to cause the said

[a] Words inclosed in brackets erased in copy.

marks of cancellation to be erased and petitioner restored to the rolls, and the refusal of the Secretary so to do, and (R., 10) concluded with a prayer for the writ of mandamus to compel him to do so.

A rule to show cause issued, to which an answer was filed (R., 24).

The answer did not admit that petitioner was a citizen of the United States or a member of the Chickasaw Nation, but admitted that he had been enrolled by the Commission to the Five Civilized Tribes upon a partial list of members by blood of the Chickasaw Nation, and that such list had been approved by the First Assistant Secretary of the Interior, as set out in the petition, but averred that thereafter, and prior to the time fixed by Congress for the completion of the rolls of members of said nation, the Secretary of the Interior had disapproved the enrollment of petitioner and struck his name from said rolls.

The answer also admitted that a certificate of allotment had been issued to petitioner by the Commissioner to the Five Civilized Tribes for certain lands selected by him, but averred that the Secretary of the Interior had not approved such allotment and that no patent had been issued or recorded therefor.

The answer further alleged (R., 26):

> 9. Respondent says that the name of petitioner was stricken from the partial list of members of the Chickasaw Nation prepared and approved, as aforesaid, by order of his predecessor as Secretary of the Interior on March 4, 1907, prior to the expiration of the time

fixed by the act of April 26, 1906 (34 Stat., 137), for the completion of the rolls of said nation, and a notation of such action made and petitioner's name lined out on the copy of said list in his possession on the same day, as appears from the certified copies of the records of the Interior Department marked Exhibits A and B, hereto attached and made a part hereof, and that petitioner's name was lined out upon the other four copies of said list, in pursuance of said order of his predecessor, after March 4, 1907, one of said copies being in the possession of the Commissioner of Indian Affairs and the other three in the possession of the Commissioner to the Five Civilized Tribes.

Respondent further says that the words "328 p. c. 198" after the words "Cancelled March 4/07" on his copy of said list refer to the number and page of the press copy book into which was copied the letter of his predecessor of March 4, 1907, striking the name of petitioner from the rolls.

And respondent avers that the action of his predecessor in striking the name of petitioner from the approved rolls of members of the Chickasaw Nation, as aforesaid, was in accordance with his long established practice, extending from the time the agreement ratified by the act of July 1, 1902 (32 Stat., 641), became operative until March 4, 1907, his predecessor, as the approved rolls of the Five Civilized Tribes in respondent's possession show, having struck several hundred names from said rolls during that time because in his judgment they were improperly enrolled.

Respondent says that there was no rule or regulation requiring the giving of notice in such cases. As to the matter of notice, respondent says that, as he is advised and believes, his predecessor at first exercised the right to strike names from approved lists of members of the Five Civilized Tribes, prior to the time fixed for the completion of the rolls, when in his judgment they were improperly and unlawfully enrolled, without notice to the party concerned, but that for about three years prior to March 4, 1907, the date fixed by the act of Congress of April 26, 1906, for the completion of the rolls, it had been the custom or practice of his predecessor to give notice in such cases and afford the party concerned an opportunity to be heard, but respondent says that, owing to the limited time in which his predecessor had to act before the expiration of the time fixed for completing the rolls, it was impossible to give notice and opportunity to be heard in the case of this petitioner and a large number of other persons whose right to be enrolled was believed by his predecessor to be adversely affected by the principles announced in an opinion rendered his predecessor by the Attorney-General on February 19, 1907, in the case of certain other persons who had been enrolled as members of the Choctaw Nation for allotment purposes, and who were stricken from the rolls by his predecessor in consequence of that opinion.

The answer further alleged that respondent's predecessor had no jurisdiction or authority to enroll petitioner in the first instance.

The answer further alleged that the matter sought to be controlled by the petitioner related to the allotment of land in severalty in the Chicasaw Nation, and that by the legislation of Congress exclusive jurisdiction of all such matters, including the making of rolls of citizenship of the Five Civilized Tribes, had been conferred upon the Secretary of the Interior; also that such matters involved the exercise of judgment and discretion on the part of the Secretary of the Interior. (R., 27.)

The petitioner filed a general demurrer to the answer, the note thereto stating (R., 30) that—

> One matter to be argued on demurrer is that the answer sets forth no sufficient reason in law for the cancellation by the Secretary of the Interior without notice of the enrollment of petitioner duly and regularly ordered.

The demurrer was sustained, Judge Wright in doing so saying (R., 30):

> I am unable to escape the conclusion that even were it conceded that the Secretary had authority to strike names from the rolls, nevertheless notice and opportunity to be heard were preliminaries essential to the exercise of the power.

The respondent electing to stand upon his answer, judgment was entered (R., 31) commanding him "to

erase from said rolls the statements placed thereon derogatory to relator's rights in said tribe and to recognize relator as an enrolled member of said tribes." Upon appeal to the Court of Appeals the judgment of the Supreme Court of the District was affirmed. (R., 41.)

The statutes bearing upon this case are set forth in the Appendix hereto.

## ASSIGNMENT OF ERRORS.

The Court of Appeals erred in affirming the judgment of the trial court and holding, in substance:

1. That the courts of the District of Columbia have jurisdiction of the subject-matter of this case.

2. In holding that, even if it were conceded that the Secretary of the Interior had authority to strike names from the approved rolls of the Choctaw and Chickasaw nations, notice and opportunity to be heard were preliminaries essential to the exercise of the power, under the circumstances of this case.

3. In not holding (assuming that the court had jurisdiction of the matters referred to in the petition) that the enrollment of petitioner was unlawful, and therefore he was not entitled to the relief prayed.

## ARGUMENT.

### I.

**The matters referred to in the petition are within the exclusive jurisdiction of the Secretary of the Interior and not subject to judicial review.**

The matters referred to in the petition relate to the allotment of land and distribution of the property of the Chickasaw Nation, one of the Five Civilized Tribes in the Indian Territory. As to this there can be no question. Enrollment is merely an incident of the allotment scheme.

The allotment and distribution of the property of the lands and other property of the Chickasaw Nation is a political matter and within the exclusive jurisdiction of Congress, except as it has otherwise provided. The agencies which Congress chose to execute this work were the Commission to the Five Civilized Tribes, which it especially created for the purpose, and the Secretary of the Interior. By the act of March 3, 1905 (33 Stat., 1048–1050), the Secretary of the Interior, subsequent to July 1, 1905, became invested with sole and exclusive jurisdiction in these matters.

Over this work of dissolving the semi-independent political communities constituted by the Five Civilized Tribes, and allotting their lands in severalty

and distributing the other property of the tribes, no court has jurisdiction, unless authorized by Congress, and Congress has expressly refrained from conferring any jurisdiction upon the courts in that regard, although at the same time it has conferred certain jurisdiction upon the circuit courts of the United States in respect to allotments elsewhere.

By the Indian appropriation act of August 15, 1894 (28 Stat., 286, 305, as amended by the act of February 6, 1901, 31 Stat., 760), it was provided:

> That all persons who are in whole or in part of Indian blood or descent, who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment act or under any grant made by Congress, *or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any act of Congress*, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper circuit court of the United States; and said circuit courts are hereby given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant); and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect,

> when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him, *but this provision shall not apply to any lands now held by either of the Five Civilized Tribes, nor to any of the lands within the Quapaw Indian Agency:* * * *

In *McKay* v. *Kalyton*, 204 U. S., 458, 468, this court, in holding that the State courts had no jurisdiction of controversies relating to Indian allotments while the title thereto was held in trust by the United States, rested its decision upon the general want of jurisdiction in the courts over Indian-allotment matters except as conferred by Congress. After referring to the act of August 15, 1894, and the case of *Hy-yu-tse-mil-kin* v. *Smith*, 194 U. S., 413, the court said:

> The *Rickert case* (188 U. S., 432) settled that, as the necessary result of the legislation of Congress, the United States retained such control over allotments as was essential to cause the allotted land to inure during the period in which the land was to be held in trust "for the sole use and benefit of the allottees." As observed in the *Smith case*, 194 U. S., 408, *prior to the passage of the act of 1894, "the sole authority for settling disputes concerning allotments resided in the Secretary of the Interior."* This being settled, it follows that *prior to the act of Congress of 1894 controversies necessarily involving a determination of the title and incidentally of the right to the possession of Indian allotments while the same were held in trust by the United States were not pri-*

> *marily cognizable by any court, either State or Federal.* It results, therefore, that the act of Congress of 1894, which delegated to the courts of the United States the power to determine such questions, can not be construed as having conferred upon the State courts the authority to pass upon Federal questions *over which, prior to the act of 1894, no court had any authority.* The purpose of the act of 1894 to continue the exclusive Federal control over the subject is manifested by the provision of that act, which commands that a judgment or decree rendered in any such controversy shall be certified by the court to the Secretary of the Interior. By this provision, as pointed out in the *Smith case supra*, the United States consented to submit its interest in the trust estate and the future control of its conduct concerning the same to the result of the decree of the courts of the United States, *a power which such courts could alone exercise by virtue of the consent given by the act.* The subsequent legislation of Congress, instead of exhibiting a departure from this policy, confirms it.

The political character of the legislation of Congress with respect to the allotment and distribution of the property of the Indian tribes, its plenary authority with respect thereto, and its freedom from judicial control in that regard, have been frequently maintained by the Supreme Court.

> *Stephens* v. *Cherokee Nation*, 174 U. S., 445.
> *Cherokee Nation* v. *Hitchcock*, 187 U. S., 294.
> *Lone Wolf* v. *Hitchcock*, 187 U. S., 553.

In *Lone Wolf* v. *Hitchcock*, *supra*, the complainants, claiming due authorization from their tribe, sought to enjoin the defendant, as Secretary of the Interior, from carrying out an alleged unconstitutional act of Congress, the claim of unconstitutionality being that the Indians were deprived of valuable property rights without their consent and to their great injury. But the court said (187 U. S., 568):

> Indeed, the controversy which this case presents is concluded by the decision in *Cherokee Nation* v. *Hitchcock* (187 U. S., 294), decided at this term, where it was held that full administrative power was possessed by Congress over Indian tribal property. In effect, the action of Congress now complained of was but an exercise of such power, a mere change in the form of investment of Indian tribal property, the property of those who, as we have held, were in substantial effect the wards of the Government. We must presume that Congress acted in perfect good faith in the dealings with the Indians of which complaint is made, and that the legislative branch of the Government exercised its best judgment in the premises. In any event, as Congress possessed full power in the matter, the judiciary can not question or inquire into the motives which prompted the enactment of this legislation. If injury was occasioned, which we do not wish to be understood as implying, by the use by Congress of its power, relief must be sought by an appeal to that body for redress, and not to the courts. * * *

It is contended that the Secretary of the Interior acted arbitrarily and in disregard of the mandate of the statute in striking the name of the relator from the approved list of members of the Chickasaw Nation. But this is not sufficient to confer jurisdiction upon the courts in a matter which, it has been repeatedly held, is within the exclusive jurisdiction of Congress, and which the acts of 1894 and 1901, above quoted, conferring jurisdiction upon the circuit courts of the United States of cases in which persons of Indian blood or descent have been unlawfully denied or excluded from any allotment, in express terms withhold. It is for Congress to determine whether the Secretary has obeyed its directions and to ratify or disapprove his action, as it deems best. There being no jurisdiction in the courts over matters relating to the allotment of lands to Indians, except as provided in the acts of 1894 and 1901 above referred to, they can not supervise and control the action of the Secretary of the Interior in execution of the legislation of Congress upon such subjects.

Even if respondent's predecessor may have acted hastily or illadvisedly, this would not be a sufficient reason to give the courts jurisdiction. In *Blackfeather* v. *United States* (190 U. S., 373) the Supreme Court said:

> The duty of this court is simply to construe the acts of Congress of 1890 and 1892. The Court of Claims has no jurisdiction of the subject-matter of this selection, unless it is conferred by one or the other of the above

> acts. The moral obligations of the Government toward the Indians, whatever they may be, are for Congress alone to recognize, and the courts can exercise only such jurisdiction over the subject as Congress may confer upon them.

If any wrong has been done by the action of respondent's predecessor in this case, it is to be presumed that Congress will correct it. It may not be inappropriate to say that the Secretary's action in these matters was under consideration by the Committee on Indian Affairs of the Senate at the last session of Congress, and the present Secretary of the Interior is expected to report fully thereon to Congress at the coming session.

## II.

**The legal title to the lands claimed by the relator being still in the United States and the Choctaw and Chickasaw nations, the lower court should have declined to interfere.**

If this case is held to be governed by the principles applicable to the administration of the public lands generally, it comes within the well-settled rule that prior to the passage of the legal title from the Government the courts will not interfere with the administration of such matters by the Land Department.

The relator has made a selection of land and has received an allotment certificate therefor from the Commissioner to the Five Civilized Tribes, but, as the answer avers (R. 26, par. 8), the Secretary of the

Interior has not approved such allotment and no patent has been issued or recorded therefor. The act of April 26, 1906, section 5 (33 Stat., 137), provides that "all patents or deeds to allottees and other conveyances affecting lands of any of said tribes shall be recorded in the office of the Commissioner to the Five Civilized Tribes, and when so recorded shall convey legal title."

The approval of the Secretary of the Interior of allotments is required by the act of June 28, 1898, sections 11 and 12 (30 Stat., 495). These provisions, not being inconsistent with the act of July 1, 1902 (32 Stat., 641), are still in force. (See par. 68 of the latter act.) Under the practice in these matters the Secretary's approval of an allotment is given when he approves the patent therefor. In an opinion rendered May 22, 1905 (25 Opin. A. G., 460), the Attorney-General held that the approval of the Secretary of the Interior of patents for allotments in the Choctaw and Chickasaw nations was necessary in order to transfer the interest of the United States.

*Brown* v. *Hitchcock*, 173 U. S., 473, 476, was a case very similar to this. A selection of land by a State under a swamp-land act had been approved by the Secretary of the Interior, then Henry M. Teller, and in consequence thereof sold by the State to the plaintiff. Subsequently, but before the issuance of patent by the United States to the State for the land, Secretary Vilas, who had succeeded Mr. Teller, annulled and canceled said selection and revoked the

approval theretofore given. In affirming the decrees of the courts of this district denying the relief by injunction, the court said (p. 476):

> Under the swamp land act the legal title passes only on delivery of the patent. So the statute in terms declares. * * *
>
> In this case the record discloses no patent and therefore no passing of the legal title. Whatever equitable rights or title may have vested in the State, the legal title remained in the United States.
>
> Until the legal title to public land passes from the Government inquiry as to all equitable rights comes within the cognizance of the Land Department.

The court then referred to *United States* v. *Schurz*, 102 U. S., 378, 396, where it was said:

> Congress has also enacted a system of laws by which rights to these lands may be acquired and the title of the Government conveyed to the citizen. This court has with a strong hand upheld the doctrine that so long as the legal title to these lands remained in the United States and the proceedings for acquiring it were yet *in fieri* the courts would not interfere to control the exercise of the power thus vested in that tribunal. To that doctrine we still adhere.

Commenting on that case the court said:

> While a delivery of the patent was ordered, yet that was so ordered because it appeared that the patent had been duly executed, countersigned, and recorded in the proper land records of the Land Department and transmitted

> to the local land office for delivery, and it was held that the mere manual delivery was not necessary to pass the title, but that the execution and record of the patent were sufficient. And yet from that conclusion Chief Justice Waite and Mr. Justice Swayne dissented. The dissent announced by the Chief Justice only emphasizes the proposition laid down in the opinion, as heretofore quoted, that so long as the legal title remains in the Government all questions of right should be solved by appeal to the Land Department and not to the courts.

*Noble* v. *Union River Logging Co.*, 147 U. S., 165, was also referred to in *Brown* v. *Walker*, with *United States* v. *Schurz*, as illustrating the exceptional cases in which a party might be justified in coming into the courts of this District to assert his rights as against a proceeding in the Land Department or where the Department refused to act at all. In that case it was held that the approval by the Secretary of the Interior of the right of way of the railroad company over public land could not be revoked by his successor, because by the terms of the act of Congress making the grant the title thereto passed to the company upon the filing of its articles of incorporation, etc., as required by the act.

In *Humbird* v. *Avery*, 195 U. S., 480, 505, the court, as stated in the syllabus, reaffirmed the general doctrine "that the courts will not interfere with the discharge of their duties by the officers of the Land Department by mandamus or injunction in reference

to any lands so long as the title thereto remains in the United States." The court said:

> When the Land Department shall have done all that it can do in execution of the act of Congress as to any particular lands in dispute it will be time enough for the interested private parties claiming an interest in them to invoke the aid of the courts for the determination of such questions of law as may arise out of the action of the Department.

In *United States* v. *Detroit Lumber Co.*, 200 U. S., 321, 337, 338, the court, referring to "the significance of a final receiver's receipt and the effect of a cancellation by the Land Department of such a receipt," said:

> Indeed, in some of the opinions of this court, emphasizing the value of a receiver's receipt, there are expressions which seem to underestimate the significance of a patent. (*Wisconsin Central R. R. Co.* v. *Price County*, 133 U. S., 496, 510; *Deseret Salt Co.* v. *Tarpey*, 142 U. S., 241, 251.) For it must be remembered that the latter is the instrument which passes the legal title and that until it is issued the legal title remains with the Government and is subject to investigation and determination by the Land Department. (*Barden* v. *Northern Pacific R. R. Co.*, 154 U. S., 288, 326; *Michigan Land and Lumber Co.* v. *Rust*, 168 U. S., 589, 592; *Guaranty Savings Bank* v. *Bladow*, 176 U. S., 448.) But while until the issue of the patent the land is under the control of the Land Department, which, upon proper investigation and for sufficient reasons,

> may set aside the certificate of entry, yet this power of the Land Department can not arbitrarily be exercised without notice to the entrymen, and if improperly exercised the rights of the entryman may be enforced in the courts *after the patent has issued to other parties.*

To the same effect is *Love* v. *Flahive*, 205 U. S., 195, 198.

Under these decisions, if the relator has any equitable right to the lands claimed by him, it is to be enforced after the title has passed from the Government and the nations, in proceedings against the grantees or purchasers instituted in the forum where the land lies.

By law the Secretary of the Interior is given "exclusive jurisdiction" "of all matters relating to the allotment of land." (Par. 24, act of July 1, 1902, 32 Stat., 641.) This declaration immediately follows the statement in the preceding paragraph that "allotment certificates issued by the Commission to the Five Civilized Tribes shall be conclusive evidence of the right of any allottee to the tract of land described therein."

These allotment certificates are similar to the final receiver's certificates in the case of the entry of public lands, from the importance given to which in some of its opinions the court said in *United States* v. *Detroit Lumber Co.*, above cited, "the significance of a patent" seemed to be underestimated.

The power of the Land Department to cancel the final receiver's certificate has been often adjudged.

*Orchard* v. *Alexander*, 157 U. S., 372.
*Parsons* v. *Venzke*, 164 U. S., 89.
*Thayer* v. *Spratt*, 189 U. S., 346.
*Hawley* v. *Diller*, 178 U. S., 476.

To say that a certificate of allotment is conclusive as against the Secretary would be to compel the allotment of land in these nations without his supervision or approval in face of the fact that he is given exclusive jurisdiction in regard thereto.

The rule is well settled that the courts will not interfere, by injunction or mandamus, with the action of executive officers requiring the exercise of judgment and discretion.

*Riverside Oil Co.* v. *Hitchcock*, 190 U. S., 324.

Whether a patent shall issue is certainly a matter involving the exercise of judgment and discretion. Mandamus will not lie to compel its issuance.

*United States* v. *Commissioner*, 5 Wall., 563.
*Secretary* v. *McGarrahan*, 9 Wall., 298.

The utmost the courts have ever done is to compel the delivery of a patent where it has been recorded and the title has passed.

*United States* v. *Schurz*, 102 U. S., 378.

The fact that citizenship of the United States has been conferred upon the Indians in the Indian Territory, among others, is immaterial, because in the legislation conferring such citizenship it was expressly

provided that that privilege was conferred "without in any manner impairing *or otherwise affecting* the right of any such Indian to tribal or other property." (Act of February 8, 1887, sec. 6, 24 Stat., 288, 390, as amended by the act of March 3, 1901, 31 Stat., 1447.) In *Cherokee Nation* v. *Hitchcock* (187 U. S., 307–308) the court said:

> * * * the authority which it is proposed to exercise, by virtue of the act of 1898, has relation merely to the control and development of the tribal property, which still remains subject to the administrative control of the Government, *even though the members of the tribe have been invested with the status of citizenship under recent legislation.*

## III.

**Authority of the Secretary of the Interior to strike names from the approved lists of the Chickasaw and Cherokee nations for cause.**

It is alleged in the answer that it was the established practice of the Secretary of the Interior, extending from the time the agreement ratified by the act of July 1, 1902, went into effect until March 4, 1907, to exercise the right to strike names from the approved lists of those nations for cause. From the beginning, therefore, the Secretary has acted upon the view that until the period fixed by the law for the completion of the rolls of the several tribes had expired he had the right to correct them as circumstances might require, treating his approval thereof, until the expiration of the time fixed for their completion, as tentative merely.

It is true the act of July 1, 1902, paragraph 30, provided that partial lists, when approved by the Secretary of the Interior, shall constitute a part and parcel of the final rolls of the tribes upon which allotment of land and distribution of other tribal property shall be made. But the same paragraph also provided that "when there shall have been submitted to and approved by the Secretary of the Interior lists embracing the names of all those *lawfully* entitled to enrollment the rolls shall be deemed complete," and by the act of April 26, 1906, the time in which to complete the rolls was extended to March 4, 1907.

The primary purpose of Congress in all its legislation with respect to the making of the rolls of members of the Five Civilized Tribes—legislation which extended over a period of ten years and involved a series of adjudications and readjudications of the citizenship of those claiming membership in such tribes—was that "correct" rolls of the tribes should be made. Thus, the act of June 10, 1896 (29 Stat., 339), directed the Commission "to use every fair and reasonable means within their reach for the purpose of determining the rights of persons claiming such citizenship or to protect any of said nation from fraud or wrong." The act of June 28, 1898 (30 Stat., 495, sec. 21), with which, together with the act of May 31, 1900, the Commission was directed by the act of July 1, 1902 (par. 27), to strictly comply in making the rolls, provided that "said Commission is authorized and directed to make *correct* rolls of citizens by blood of all the other

tribes, eliminating from the tribal rolls such names as may have been placed thereon by fraud and without authority of law," etc. The act of May 31, 1900 (31 Stat., 1058, 1077), provided that the Commission "shall not receive, consider, or make any record of any application of any person for enrollment as a member of any tribe in any Indian territory who has not been a recognized citizen thereof and duly and lawfully enrolled or admitted as such."

Evidently the Secretary of the Interior, in the light of these provisions, felt himself authorized to correct any mistakes that might have been made in the approved lists of members of such tribes prior to the time fixed for the completion of the same.

The practice of the Secretary in this regard was apparently so notorious and so widely extended that it may fairly be said to have been recognized and approved by Congress in its subsequent legislation. The act of April 26, 1906 (34 Stat., 137), was evidently passed with a full knowledge of what the Secretary had been doing and impliedly ratified his course of procedure with certain limitations upon its future exercise, a provision which required that the process of roll making should be brought to a completion. It first provided (sec. 1) that no *motions* to reopen or reconsider any case should be entertained unless filed within a certain time. It fixed the date upon which the rolls should be fully completed at March 4, 1907 (sec. 2). And by section 4 it provided that "no name shall be transferred from the approved freedmen or any other

approved rolls of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes, respectively, to the roll of citizens by blood unless the records in charge of the Commission to the Five Civilized Tribes show that application was made within the time prescribed by law," etc. The freedmen rolls of the Choctaw and Chickasaw tribes were directed to be made exactly as the rolls of members by blood (par. 30, act of July 1, 1902, 32 Stat., 646). Like finality was also declared to attach to the approved freedmen rolls of the other tribes. This provision of section 4 of the act of April 26, 1906, therefore, distinctly recognizes the authority of the Secretary to transfer a name from one approved list to another and merely limits it to certain cases. Of course, as the transfer of a name from one approved list to another involved the cancellation of that name upon the list from which it was taken, the practice of cancellation was thus necessarily recognized and confirmed.

The rule as to the effect to be given the contemporaneous and long-continued construction of statutes by executive officers charged with their administration is well settled. It is said that it is entitled to great respect, and should not be disregarded except for cogent reasons and it is clear that such construction is erroneous.

> *United States* v. *Johnston*, 124 U. S., 236, 253;
> *Pennoyer* v. *McConnaughy*, 140 U. S., 1.

In this case we submit that the departmental construction should be sustained, not only because the

question whether the Secretary of the Interior could alter the approved lists within the time fixed by law for the completion of the rolls of the several tribes, is not free from doubt, but because of the apparent recognition and approval of his practice in that regard, given by the act of April 26, 1906, as well as the fact that it is in accord with the primary object of all this legislation—the making of correct rolls. Congress having committed the entire work of enrolling the members of the Five Civilized Tribes and allotting them lands to the final judgment and control of the Secretary of the Interior, the courts, even if taking jurisdiction, would be extremely loath to interfere with his action in such cases.

The matter before the court is not affected by the question of vested rights. If by reason of the selection of land made to him the relator has acquired any vested rights therein, as he alleges, he can assert them in the proper court after the title to the land has passed from the United States and the Chickasaw Nation. But that the mere expectation of a share in the property of the nation arising from the fact of his once having been enrolled does not create a vested right therein is settled by the decisions of the Supreme Court.

*Stephens* v. *Cherokee Nation*, 174 U. S., 445.
*Cherokee Nation* v. *Hitchcock*, 187 U. S., 294.
*Lone Wolf* v. *Hitchcock*, 187 U. S., 553.
*Morris* v. *Hitchcock*, 194 U. S., 384.
*Wallace* v. *Adams*, 204 U. S., 415.

In *Stephens* v. *Cherokee Nation*, 174 U. S., 478, the court, in answering the contention that the act of Congress of June 1, 1898, giving, retrospectively, a right of appeal to that court from judgments of the United States courts for the Indian Territory in citizenship cases, was unconstitutional, said:

> In its enactment Congress has not attempted to interfere in any way with the judicial department of the Government, nor can the act be properly regarded as destroying any vested right, since the right asserted to be vested is only the exemption of these judgments from review, and *the mere expectation of a share in the public lands and moneys of these tribes, if hereafter distributed, if the applicants are admitted to citizenship, can not be held to amount to such an absolute right of property that the original cause of action, which is citizenship or not, is placed by the judgment of a lower court beyond the power of reexamination by a higher court though subsequently authorized by general law to exercise jurisdiction.*

In *Wallace* v. *Adams*, 204 U. S., 415, 423, the court upheld the validity of the act of Congress of July 1, 1902, establishing the citizenship court and giving it jurisdiction to reexamine the judgments of the United States courts in the Indian Territory admitting persons to citizenship in the Choctaw and Chickasaw nations. In that case, as appears from the finding of facts in the Circuit Court of Appeals (143 Fed., 716) which were adopted by this court,

the defendant Hill, who had been admitted to citizenship by the United States court in the Indian Territory under the act of June 10, 1896, had selected and resided upon the lands claimed by him. While thus in possession Congress had passed the act of June 28, 1898 (30 Stat., 495, 498), which provided that any member should be entitled to receive his allotment out of the lands in his possession, and Hill made this choice. Furthermore, the Choctaw Nation appealed to this court from the judgment in favor of Hill, and his judgment had been affirmed in *Stephens* v. *Cherokee Nation*, 174 U. S., 445. However, on this state of facts the court said:

> This decision established that no vested right was created by the proceedings of the Dawes Commission or the judgments of the courts of the Indian Territory on appeal from the findings of the Commission as prevented subsequent investigation. The power of Congress over the matter of citizenship in these Indian tribes was plenary, and it could adopt any reasonable means to ascertain who were entitled to its privileges. If the result of one measure was not satisfactory it could try another. * * *

In the case at bar, however, the enrollment of the relator was never finally approved, the approval of the Secretary prior to the time fixed for the completion of the rolls being regarded by him as tentative merely.

## IV.

**Notice and opportunity to be heard should not have been held indispensable under the circumstances of this case.**

Upon this point the answer states (R., 26–27):

> Respondent says that there was no rule or regulation requiring the giving of notice in such cases. As to the matter of notice, respondent says that, as he is advised and believes, his predecessor at first exercised the right to strike names from approved lists of members of the Five Civilized Tribes prior to the time fixed for the completion of the rolls, when in his judgment they were improperly and unlawfully enrolled, without notice to the party concerned, but that for about three years prior to March 4, 1907, the date fixed by the act of Congress of April 26, 1907, for the completion of the rolls, it had been the custom or practice of his predecessor to give notice in such cases and afford the party concerned an opportunity to be heard, but respondent says that, owing to the limited time in which his predecessor had to act before the expiration of the time fixed for completing the rolls, it was impossible to give notice and opportunity to be heard in the case of this petitioner and a large number of other persons whose right to be enrolled was believed by his predecessor to be adversely affected by the principles announced in an opinion rendered his predecessor by the Attorney-General on February 19, 1907, in the case of certain other persons who had

been enrolled as members of the Choctaw Nation for allotment purposes and who were stricken from the rolls by his predecessor in consequence of that opinion.

The several statutes governing the making of the rolls left it entirely to the judgment and discretion of the Commission to the Five Civilized Tribes and the Secretary of the Interior to determine the course of procedure in the matter. It is true the applicant was enrolled under rules and regulations prescribed by the Commission and the Secretary requiring notice and opportunity to be heard of all steps taken in the matter of enrollment. But, as stated in the answer, it was impossible in this and a number of other cases believed by the Secretary to be adversely affected by the opinion of the Attorney-General of February 19, 1907, to follow the usual practice in such cases, and the Secretary was the judge of whether such notice and opportunity to be heard was indispensable therein. There was, as alleged in the answer, no hard and fast rule on the subject, but if there had been, the power that could prescribe the rule could certainly suspend it if the exigencies of the case seemed so to require. The Secretary had only a short time in which to act before the time fixed by Congress for the completion of the rolls would expire, and he acted as best he could under the circumstances with a view to conforming as strictly as possible to the mandate of Congress as he understood it to be interpreted by the Attorney-General. It should be

observed that the particular question presented in this case of the right of the Secretary to strike names from the approved rolls of the Five Civilized Tribes was not passed upon in that opinion.

As to the fact that the names of relators were not stricken from the other four copies of the approved lists before the expiration of the time fixed for the completion of the rolls, it would seem sufficient to say that they were stricken before that time from the list in the possession of the Secretary of the Interior and upon which he must act in allotting the lands and distributing the other property of the tribes. The order of the Secretary ought, in any event, to be taken as sufficient for the purpose. The lining out of the names upon the lists was simply a ministerial act, which should be held to follow as of course. This evidently was the view of Judge Wright in the matter.

V.

**The enrollment of petitioner in the first instance was unauthorized.**

Upon this point the answer states (R., 26):

> That petitioner applied in 1896 to the Commissioner to the Five Civilized Tribes to be admitted and enrolled as a citizen of the Chickasaw Nation under the act of June 10, 1896 (29 Stat., 329), and his application was allowed; that the Chickasaw Nation appealed from the judgment of the Commissioner to the United States Court, Southern Division, Indian

> Territory, which approved the same; that thereafter the judgment of the United States court was annulled by the citizenship court in the test suit provided for by the agreement with the Choctaw and Chickasaw nations, ratified by the act of Congress of July 1, 1902 (32 Stat., 641, 646); that petitioner failed to remove his case to the citizenship court for final determination as provided by said act; and that thereafter the Commissioner to the Five Civilized Tribes and Secretary of the Interior had no jurisdiction to enroll petitioner.

Paragraph 27 of the agreement with the Choctaws and Chickasaws, ratified by the act of July 1, 1902, forbade the enrollment and allotment of any person claiming such rights by virtue of a judgment of the United States Court in the Indian Territory, whose right was contested by legal proceedings instituted under the provisions of that agreement, until his right thereto had been finally determined.

The judgment of the United States court in petitioner's case was annulled in the test suit instituted in pursuance of paragraph 31 of the Choctaw and Chickasaw agreement, whereby, as held by Acting Attorney-General McReynolds in an opinion rendered the Secretary of the Interior May 9, 1904, it became his duty to remove his case to the Choctaw and Chickasaw citizenship court, failing in which the Commission and the Secretary were prohibited by paragraph 27 from enrolling him.

In his opinion the Acting Attorney-General said (25 Opin. A. G., 155–156):

> In view of the foregoing facts, and to enable you to determine what course to pursue, you request my opinion "whether the annulment of the United States court judgment affirming a favorable decision of the Commission to the Five Civilized Tribes upon an application for citizenship so far deprived the applicant of a favorable judgment as to devolve upon him the duty of causing his cause to be transferred to the Choctaw and Chickasaw citizenship court, as provided in section 31 of said act of July 1, 1902, to protect and preserve his claimed rights, or whether the annulment of the United States court judgment revived and put in force and effect the judgment of the Commission to the Five Civilized Tribes admitting such person to citizenship."
>
> A manifest purpose of the act of July 1, 1902, was to enable the Indian nations to test the validity of judgments of United States courts granting rights of citizenship therein to applicants which were subject to either of the objections above detailed, and, if found to be invalid, to prevent enrollment of the parties unless the citizenship court should thereafter adjudge them entitled thereto. Any applicant deprived of a favorable judgment of the court by the decree in the test case had a right, within the time specified, to transfer his cause into the citizenship court and have the issues finally determined; but no right of

transfer under such circumstances was given the Indians. Where an applicant was admitted by the Commission and upon appeal such action was affirmed, and thereafter the decree of the United States court was declared null and void in the test case, the nations *could not* transfer the cause to the citizenship court; and if, as now claimed, the annulment *ex proprio vigore* gave efficacy to the appealed-from action of the Commission, then—the other parties being powerless to act—simple inaction by the applicant would have perfected his right to citizenship, and the Indians, by prevailing in the test cause, would have accomplished nothing. The Indians had no right to transfer the cause, and, of course, under the conditions contended for, the applicant would not have so done.

I am of opinion that annulment of the United States court judgment affirming a favorable decision of the Commission to the Five Civilized Tribes upon an application for citizenship so far deprived the applicant of a favorable judgment as to devolve upon *him* the duty of causing his cause to be transferred to the citizenship court. I am further of opinion that annulment of the United States court judgment did not revive and put into force and effect the judgment of the Commission to the Five Civilized Tribes admitting such person to citizenship, and that enrollment by the Commission based upon such a theory would be a clear violation of the rights of the Indian nations.

If the courts have jurisdiction to inquire whether petitioner's name was properly stricken from the rolls, they may also inquire whether his name was properly placed thereon in the first instance; and if they find that he was not, his petition should be dismissed.

It is respectfully submitted that the judgment of the Court of Appeals should be reversed.

CHARLES J. BONAPARTE,
*Attorney-General.*

JAMES A. FOWLER,
*Assistant Attorney-General.*

WILLIAM R. HARR,
*Attorney.*

# APPENDIX.

## STATUTES.

The act of March 3, 1893 (27 Stat., 645), created the Commission to the Five Civilized Tribes in the Indian Territory for the purpose of negotiating with such tribes for the extinguishment of the tribal titles to the lands occupied by them, by the cession of the same or a part thereof to the United States, or their allotment in severalty to the members of such tribes, with a view to the ultimate creation of a State or States embracing such lands.

The act of June 10, 1896 (29 Stat., 329), continued the authority of the Commission and provided:

"That said Commission is further authorized and directed to proceed at once to hear and determine the application of all persons who may apply to them for citizenship in any of said nations, and after such hearing they shall determine the right of such applicant to be so admitted and enrolled. * * * That in determining all such applications said Commission shall respect all laws of the several nations or tribes, not inconsistent with the laws of the United States, and all treaties with either of said nations or tribes, and shall give due force and effect to the rolls, usages, and customs of each of said nations or tribes: *And provided further*, That the rolls of citizenship of the several tribes as now existing are hereby confirmed, and any person who shall claim to be entitled to be added to said rolls as a citizen of either of said tribes and whose right thereto has either been denied or not acted upon, or any citizen who may within three months from and after the passage of this act desire such citizenship, may apply to the legally constituted court or committee designated by the several tribes for such citizenship, and such court or committee shall determine such application within thirty days from the date thereof.

"In the performance of such duties said Commission shall * * * *use every fair and reasonable means within their reach for the purpose of determining the rights of persons claiming such citizenship, or to protect any of said nations from fraud or wrong* and the rolls so prepared by them shall

be hereafter held and considered to be the true and correct rolls of persons entitled to the rights of citizenship in said several tribes: *Provided*, That if the tribe, or any person, be aggrieved with the decision of the tribal authorities or the Commission provided for in this act, it or he may appeal from such decision to the United States district court: *Provided, however*, That the appeal shall be taken within sixty days, and the judgment of the court shall be final.

"That the said Commission, after the expiration of six months, shall cause a complete roll of citizenship of each of said nations to be made up from their records, and add thereto the names of citizens whose right may be conferred under this act, and said rolls shall be, and are hereby, made rolls of citizenship of said nations or tribes, subject, however, to the determination of the United States courts, as provided herein.

"The Commission is hereby required to file the lists of members as they finally approve them with the Commissioner of Indian Affairs, to remain there for use as the final judgment of the duly constituted authorities."

The act of June 7, 1897 (30 Stat., 84), provided:

"That said Commission shall continue to exercise all authority heretofore conferred on it by law to negotiate with the Five Tribes, and any agreement made by it with any one of said tribes, when ratified, shall operate to suspend any provisions of this act if in conflict therewith as to said nation: *Provided*, That the words 'rolls of citizenship,' as used in the act of June tenth, eighteen hundred and ninety-six, making appropriations for current and contingent expenses of the Indian Department and fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, eighteen hundred and ninety-seven, shall be construed to mean the last authenticated rolls of each tribe which have been approved by the council of the nation, and the descendants of those appearing on such rolls, and such additional names and their descendants as have been subsequently added, either by the council of such nation, the duly authorized courts thereof, or the Commission under the act of June tenth, eighteen hundred and ninety-six. And all other names appearing upon such rolls shall be open to investigation by such Commission for a period of six months after the passage of this act. And any name appearing on such rolls and not confirmed by the act of June tenth, eighteen hundred and ninety-six, as herein construed, may be stricken therefrom by such Commission where the party affected shall have ten days' previous notice that said Commission will investigate and determine the right of such party to remain upon such roll as a citizen of such nation: *Provided also*, That any-

one whose name shall be stricken from the roll by such Commission shall have the right of appeal, as provided in the act of June tenth, eighteen hundred and ninety-six."

The act of June 28, 1898, known as the Curtis Act (30 Stat., 495), provided:

"SEC. 11. That when the roll of citizenship of any one of said nations or tribes is fully completed, as provided by law, and the survey of the lands of said nation or tribe is also completed, the Commission heretofore appointed under act of Congress, and known as the 'Dawes Commission,' shall proceed to allot the exclusive use and occupancy of the surface of all the lands of said nation or tribe susceptible of allotment among the citizens thereof, as shown by said roll, giving to each, so far as possible, his fair and equal share thereof, considering the nature and fertility of the soil, location, and value of same. * * * * *When such allotment of the lands of any tribe has been by them completed, said Commission shall make full report thereof to the Secretary of the Interior for his approval* * * *."

SEC. 12. *That when report of allotments of lands of any tribe shall be made to the Secretary of the Interior, as hereinbefore provided, he shall make a record thereof, and when he shall confirm such allotments the allottees shall remain in peaceable and undisturbed possession thereof, subject to the provisions of this act.*

* * * * *

SEC. 21. That in making rolls of citizenship of the several tribes, as required by law, the Commission to the Five Civilized Tribes is authorized and directed to take the roll of Cherokee citizens of eighteen hundred and eighty (not including freedmen) as the only roll intended to be confirmed by this and preceding acts of Congress and to enroll all persons now living whose names are found on said roll, and all descendants born since the date of said roll to persons whose names are found thereon; and all persons who have been enrolled by the tribal authorities who have heretofore made permanent settlement in the Cherokee Nation whose parents were so admitted; and they shall investigate the right of all other persons whose names are found on any other rolls and omit all such as may have been placed thereon by fraud or without authority of law, enrolling only such as may have lawful right thereto, and their descendants born since such rolls were made, with such intermarried white persons as may be entitled to citizenship under Cherokee laws.

* * * * *

*Said Commission is authorized and directed to make correct rolls of the citizens by blood of all the other tribes, eliminating*

*from the tribal rolls such names as may have been placed thereon by fraud or without authority of law, enrolling such only as may have lawful right thereto, and their descendants born since such rolls were made, with such intermarried white persons as may be entitled to Choctaw and Chickasaw citizenship under the treaties and the laws of said tribes.*

* * * * *

*The rolls so made, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon, with their descendants thereafter born to them, with such persons as may intermarry according to tribal laws, shall alone constitute the several tribes which they represent.*

* * * * *

SEC. 29. That the agreement made by the Commission to the Five Civilized Tribes with commissions representing the Choctaw and Chickasaw tribes of Indians on the twenty-third day of April, eighteen hundred and ninety-seven [commonly known as the Atoka agreement], as herein amended, is hereby ratified and confirmed, and the same shall be of full force and effect if ratified before the first day of December, eighteen hundred and ninety-eight, by a majority of the whole number of votes cast by the members of said tribes at an election held for that purpose; * * * and if said agreement as amended be so ratified, the provisions of this act shall then only apply to said tribes where the same do not conflict with the provisions of said agreement; but the provisions of said agreement, if so ratified, shall not in any manner affect the provisions of section fourteen of this act, which said amended agreement is as follows:

* * * * *

This agreement, * * *

ALLOTMENT OF LANDS.

Witnesseth, That in consideration of the mutual undertakings herein contained it is agreed as follows:

That all the lands within the Indian Territory belonging to the Choctaw and Chickasaw Indians shall be allotted to the members of said tribes so as to give to each member of these tribes so far as possible a fair and equal share thereof, considering the character and fertility of the soil and the location and value of the lands.

* * * * *

MEMBERS' TITLES TO LANDS.

That as soon as practicable after the completion of said allotments the principal chief of the Choctaw Nation and

the governor of the Chickasaw Nation shall jointly execute, under their hands and the seals of the respective nations, and deliver to each of the said allottees patents conveying to him all the right, title, and interest of the Choctaws and Chickasaws in and to the land which shall have been allotted to him in conformity with the requirements of this agreement, excepting all coal and asphalt in or under said land. Said patents shall be framed in accordance with the provisions of this agreement, and shall embrace the land allotted to such patentee and no other land, and the acceptance of his patents by such allottee shall be operative as an assent on his part to the allotment and conveyance of all the lands of the Choctaws and Chickasaws in accordance with the provisions of this agreement and as a relinquishment of all his right, title, and interest in and to any and all parts thereof, except the land embraced in said patents, except also his interest in the proceeds of all lands, coal, and asphalt herein excepted from allotment.

That the United States shall provide by law for proper record of land titles in the territory occupied by the Choctaw and Chickasaw tribes.

[NOTE.—This agreement was ratified by the tribes.]

The act of May 31, 1900 (31 Stat., 236), provided:

"That said Commission shall continue to exercise all authority heretofore conferred upon it by law. But it shall not receive, consider, or make any record of any application of any person for enrollment as a member of any tribe in Indian Territory who has not been a recognized citizen thereof and duly and lawfully enrolled or admitted as such, and its refusal of such application shall be final when approved by the Secretary of the Interior."

The act of March 3, 1901 (31 Stat., 1077), provided:

"The rolls made by the Commission to the Five Civilized Tribes, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon shall alone constitute the several tribes which they represent; and the Secretary of the Interior is authorized and directed to fix a time by agreement with said tribes or either of them for closing said rolls, but upon failure or refusal of said tribes or any of them to agree thereto, then the Secretary of the Interior shall fix a time for closing said rolls, after which no name shall be added thereto."

The act of July 1, 1902 (32 Stat., 641), ratified an agreement with the Choctaw and Chickasaw nations, which provided:

ALLOTMENT OF LANDS.

11. There shall be allotted to each member of the Choctaw and Chickasaw tribes as soon as practicable after the approval by the Secretary of the Interior of his enrollment as herein provided, land equal in value to three hundred and twenty acres of the average allottable land of the Choctaw and Chickasaw nations, and to each Choctaw and Chickasaw freedman, as soon as practicable after the approval by the Secretary of the Interior of his enrollment, land equal in value to forty acres of the average allottable land of the Choctaw and Chickasaw nations; * * *

12. Each member of said tribes shall, at the time of the selection of his allotment, designate as a homestead out of said allotment land equal in value to one hundred and sixty acres of the average allottable land of the Choctaw and Chickasaw nations, as nearly as may be, which shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment, and separate certificate and patent shall issue for said homestead.

13. The allotment of each Choctaw and Chickasaw freedman shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment.

14. When allotments as herein provided have been made to all citizens and freedmen, the residue of lands not herein reserved or otherwise disposed of, if any there be, shall be sold at public auction under rules and regulations and on terms to be prescribed by the Secretary of the Interior, and so much of the proceeds as may be necessary for equalizing allotments shall be used for that purpose, and the balance shall be paid into the Treasury of the United States to the credit of the Choctaws and Chickasaws and distributed per capita as other funds.

15. Lands allotted to members and freedmen shall not be affected or encumbered by any deed, debt, or obligation of any character contracted prior to the time at which said land may be alienated under this act, nor shall said lands be sold except as herein provided.

16. All lands allotted to the members of said tribes, except such land as is set aside to each for a homestead as herein provided, shall be inalienable *after issuance of patent* as follows: One-fourth in acreage in one year, one-fourth in acreage in three years, and the balance in five years; in each case from date of patent: *Provided*, That such land shall not be alienable by the allottee or his heirs at any time before

the expiration of the Choctaw and Chickasaw tribal governments for less than its appraised value.

* * * * *

23. *Allotment certificates* issued by the Commission to the Five Civilized Tribes shall be conclusive evidence of the right of any allottee to the tract of land described therein; and the United States Indian agent at the Union Agency shall, upon the application of the allottee, place him in possession of his allotment, and shall remove therefrom all persons objectionable to such allottee, and the acts of the Indian agent hereunder shall not be controlled by the writ or process of any court.

24. *Exclusive jurisdiction is hereby conferred upon the Commission to the Five Civilized Tribes to determine, under the direction of the Secretary of the Interior, all matters relating to the allotment of land.*

* * * * *

ROLLS OF CITIZENSHIP.

27. The rolls of the Choctaw and Chickasaw citizens and Choctaw and Chickasaw freedmen shall be made by the Commission to the Five Civilized Tribes in strict compliance with the act of Congress approved June 28, 1898 (30 Stats., 495), and the act of Congress approved May 31, 1900 (31 Stats., 221), except as herein otherwise provided: *Provided,* That no person claiming right to enrollment and allotment and distribution of tribal property by virtue of a judgment of the United States court in the Indian Territory under the act of June 10, 1896 (29 Stats., 321), and which right is contested by legal proceedings instituted under the provisions of this agreement, shall be enrolled or receive allotment of lands or distribution of tribal property until his right thereto has been finally determined.

30. For the purpose of expediting the enrollment of the Choctaw and Chickasaw citizens and the Choctaw and Chickasaw freedmen, the said Commission shall, from time to time, and as early as practicable, forward to the Secretary of the Interior lists upon which shall be placed names of those persons found by the Commission to be entitled to enrollment. *The lists thus prepared, when approved by the Secretary of the Interior, shall constitute a part and parcel of the final rolls of citizens of the Choctaw and Chickasaw tribes and of Choctaw and Chickasaw freedmen, upon which allotment of land and distribution of other tribal property shall be made as herein provided.* Lists shall be made up and forwarded when contests of whatever character shall have been determined, *and when there shall have been submitted to and approved by the Secretary of the Interior lists embracing names of all those lawfully entitled to enrollment, the rolls shall be*

*deemed complete*. The rolls so prepared shall be made in quintuplicate, one to be deposited with the Secretary of the Interior, one with the Commissioner of Indian Affairs, one with the principal chief of the Choctaw Nation, one with the governor of the Chickasaw Nation, and one to remain with the Commission to the Five Civilized Tribes.

31. It being claimed and insisted by the Choctaw and Chickasaw nations that the United States courts in the Indian Territory, acting under the act of Congress approved June 10, 1896, have admitted persons to citizenship or to enrollment as such citizens in the Choctaw and Chickasaw nations, respectively, without notice of the proceedings in such courts being given to each of said nations, and it being insisted by said nations that in such proceedings notice to each of said nations was indispensable, and it being claimed and insisted by said nations that the proceedings in the United States courts in the Indian Territory, under the said act of June 10, 1896, should have been confined to a review of the action of the Commission to the Five Civilized Tribes upon the papers and evidence submitted to such Commission, and should not have extended to a trial de novo of the question of citizenship, and it being desirable to finally determine these questions, the two nations jointly, or either of said nations acting separately and making the other a party defendant, may, within ninety days after this agreement becomes effective, by a bill in equity filed in the Choctaw and Chickasaw citizenship court hereinafter named, seek the annulment and vacation of all such decisions by said courts. Ten persons so admitted to citizenship or enrollment by said courts, with notice to one, but not to both of said nations, shall be made defendants to said suit as representatives of the entire class of persons similarly situated, the number of such persons being too numerous to require all of them to be made individual parties to the suit; but any person so situated may, upon his application, be made a party defendant to the suit. Notice of the institution of said suit shall be personally served upon the chief executive of the defendant nation, if either nation be made a party defendant as aforesaid, and upon each of said ten representative defendants, and shall also be published for a period of four weeks in at least two weekly newspapers having general circulation in the Choctaw and Chickasaw nations. Such notice shall set forth the nature and prayer of the bill, with the time for answering the same, which shall not be less than thirty days after the last publication. Said suit shall be determined at the earliest practicable time, shall be confined to a final determination of the questions of law here named, and shall be without prejudice to the determination of any charge or claim that the admission of such persons to citizenship or enrollment by said United States courts in the

Indian Territory was wrongfully obtained as provided in the next section. In the event said citizenship judgments or decisions are annulled or vacated in the test suit hereinbefore authorized, because of either or both of the irregularities claimed and insisted upon by said nations as aforesaid, then the files, papers, and proceedings in any citizenship case in which the judgment or decision is so annulled or vacated shall, upon written application therefor, made within ninety days thereafter by any party thereto who is thus deprived of a favorable judgment upon his claimed citizenship, be transferred and certified to said citizenship court by the court having custody and control of such files, papers, and proceedings in any such citizenship case, accompanied by due proof that notice in writing of the transfer and certification thereof has been given to the chief executive officer of each of said nations, said citizenship case shall be docketed in said citizenship court, and such further proceedings shall be had therein in that court as ought to have been had in the court to which the same was taken on appeal from the Commission to the Five Civilized Tribes and as if no judgment or decision had been rendered therein.

35. No person whose name does not appear upon the rolls prepared, as herein provided, shall be entitled to in any manner participate in the distribution of the common property of the Choctaw and Chickasaw tribes, and those whose names appear thereon shall participate in the manner set forth in this agreement.

* * * * *

66. *All patents to allotments of land, when executed, shall be recorded in the office of the Commission to the Five Civilized Tribes within said nations in books appropriate for the purpose*, until such time as Congress shall make other suitable provision for record of land titles, as provided in the Atoka agreement, without expense to the grantee; and such records shall have like effect as other public records.

* * * * *

68. No act of Congress or treaty provision, nor any provision of the Atoka agreement, inconsistent with this agreement, shall be in force in said Choctaw and Chickasaw nations.

69. All controversies arising between members as to their right to select particular tracts of lands shall be determined by the Commission to the Five Civilized Tribes.

* * * * *

71. After the expiration of nine months after the date of the original selection of an allotment, by or for any citizen or freedman of the Choctaw or Chickasaw tribes, as provided in this agreement, no contest shall be instituted against such selection.

72. There shall be paid to each citizen of the Chickasaw Nation, immediately after the approval of his enrollment and right to participate in distribution of tribal property, as herein provided, the sum of forty dollars. * * *

The act of February 25, 1903 (32 Stat., 854, 891), provided:

"*For pay of one clerk, to be appointed by the Secretary of the Interior, to sign, under the direction of the Secretary, in his name and for him, his approval of all tribal deeds to allottees and deeds for town lots made and executed according to law for any of the Five Civilized Tribes of Indians in the Indian Territory*, one thousand two hundred dollars, to be immediately available."

The act of March 3, 1905 (33 Stat., 1060), provided:

" * * * That the work of completing the unfinished business, if any, of the Commission to the Five Civilized Tribes shall devolve upon the Secretary of the Interior, and that all the powers heretofore granted to the said Commission to the Five Civilized Tribes are hereby conferred upon the said Secretary on and after the first of July, nineteen hundred and five."

The act of April 26, 1906 (34 Stat., 137), provided:

SEC. 2. * * * *That the rolls of the tribes affected by this act shall be fully completed on or before the fourth day of March, nineteen hundred and seven, and the Secretary of the Interior shall have no jurisdiction to approve the enrollment of any person after said date:* * * *

* * * * *

SEC. 4. *That no name shall be transferred from the approved freedmen, or any other approved rolls of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes, respectively, to the roll of citizens by blood, unless the records in charge of the Commissioner to the Five Civilized Tribes show* that application for enrollment as a citizen by blood was made within the time prescribed by law by or for the party seeking the transfer, and said records shall be conclusive evidence as to the fact of such application, unless it be shown by documentary evidence that the Commission to the Five Civilized Tribes actually received such application within the time prescribed by law.

SEC. 5. That all patents or deeds to allottees in any of the Five Civilized Tribes to be hereafter issued shall issue in the name of the allottee, and if any such allottee shall die before such patent or deed becomes effective, the title to the lands described therein shall inure to and vest in his heirs, and in

case any allottee shall die after restrictions have been removed, his property shall descend to his heirs or his lawful assigns as if the patent or deed had issued to the allottee during his life, and all patents heretofore issued, where the allottee died before the same became effective, shall be given like effect; *and all patents or deeds to allottees and other conveyances affecting lands of any of said tribes shall be recorded in the office of the Commissioner to the Five Civilized Tribes, and when so recorded shall convey legal title,* and shall be delivered under the direction of the Secretary of the Interior to the party entitled to receive the same: *Provided,* The provisions of this section shall not affect any rights involved in contests pending before the Commissioner to the Five Civilized Tribes or the Department of the Interior at the date of the approval of this act.

SEC. 6. That if the principal chief of the Choctaw, Cherokee, Creek, or Seminole tribe, or the governor of the Chickasaw tribe, shall refuse or neglect to perform the duties devolving upon him he may be removed from office by the President of the United States, or if any such executive become permanently disabled the office may be declared vacant by the President of the United States, who may fill any vacancy arising from removal, disability, or death of the incumbent by appointment of a citizen by blood of the tribe.

*If any such executive shall fail, refuse, or neglect, for thirty days after notice that any instrument is ready for his signature, to appear at a place to be designated by the Secretary of the Interior and execute the same, such instrument may be approved by the Secretary of the Interior without such execution, and when so approved and recorded shall convey legal title,* and such approval shall be conclusive evidence that such executive or chief refused or neglected after notice to execute such instrument.

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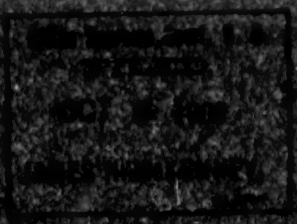

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# In the Supreme Court of the United States.

OCTOBER TERM, 1908.

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| JAMES RUDOLPH GARFIELD, SECRETARY of the Interior, Plaintiff in Error, *v.* THE UNITED STATES EX REL. IDA ALLISON. | No. 249. |
| JAMES RUDOLPH GARFIELD, SECRETARY of the Interior, Plaintiff in Error, *v.* THE UNITED STATES EX REL. GEORGE A. ALLISON. | No. 250. |

*IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.*

## BRIEF FOR PLAINTIFF IN ERROR.

These cases are similar in all substantial respects, except as to certain matters hereinafter noted, to the case of *James Rudolph Garfield, Secretary of the Interior, plaintiff in error*, v. *The United States ex rel. John E. Goldsby*, No. 248 of this term, and are submitted on the brief filed in that case, together with the additional statements herein made.

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The pleadings in these cases are exactly like those in the Goldsby case, except that in the case of George A. Allison a patent has been issued and recorded for the lands selected by him, while in the Goldsby and Ida Allison cases no patents have been issued or recorded, and that in both of these cases the want of jurisdiction and authority in the Commission to the Five Civilized Tribes and the Secretary of the Interior to enroll petitioners alleged by respondent is based on the ground that, as the Commission to the Five Civilized Tribes in 1896 denied their applications to be admitted and enrolled as citizens of the Cherokee Nation under the act of June 10, 1896 (29 Stat., 329), and as they took no appeal to the United States Court for the Indian Territory as provided in that act, the judgment of the Commission became thereby final. (Paragraphs 8 and 11 of each answer.)

The act of Congress of July 1, 1902 (32 Stat., 716), in regard to the allotment of lands in the Cherokee Nation and the making of the rolls of members of that nation, is similar in all substantial respects, so far as these cases are concerned, to the act of the same date (32 Stat., 641) in relation to the Choctaw and Chickasaw nations. The material parts of the act are appended.

In regard to the case of George A. Allison, who has received a patent for his allotment, it is sufficient to say that he has a legal title thereto which can only be defeated by its cancellation in a proper suit on the part of the United States. His only interest in the maintenance of his name upon the Cherokee rolls is

in respect to any further distribution of the property of the nation that may be made.

As stated, the respondent alleges want of jurisdiction and authority in his predecessor to enroll petitioners in these cases because of the denial of their applications by the Commission to the Five Civilized Tribes in 1896 and their failure to appeal to the United States Court from such decision, which thus became final.

By section 27 of the Cherokee act of July 1, 1902, it is provided that "the rolls shall in all other respects be made in strict compliance with the provisions of section 21 of the act of Congress approved June 28, 1898 (30 Stat., 495), and the act of Congress approved May 31, 1900 (31 Stat., 221)." The latter act provided (31 Stat., 236):

> That said Commission shall continue to exercise all authority heretofore conferred upon it by law. But it shall not receive, consider, or take any record of any application of any person for enrollment as a member of any tribe in Indian Territory who has not been a recognized citizen thereof, and duly and lawfully enrolled or admitted as such, and its refusal of such application shall be final when approved by the Secretary of the Interior. * * *

Petitioners having been denied admission to citizenship by the Commission in 1896, it was the duty of the Commission under this act to have refused to receive their subsequent applications, and so the Secretary of the Interior ultimately held.

For these reasons, as well as the jurisdictional and other grounds set forth in the brief filed in the Goldsby case, the judgment of the Court of Appeals should be reversed.

CHARLES J. BONAPARTE,
*Attorney-General.*

JAMES A. FOWLER,
*Assistant Attorney-General.*

WILLIAM R. HARR,
*Attorney.*

*Act of July 1, 1902 (32 Stat., 716), relating to the allotment of lands in the Cherokee Nation.*

* * * * *

ALLOTMENT OF LANDS.

SEC. 11. There shall be allotted by the Commission to the Five Civilized Tribes and to each citizen of the Cherokee tribe, as soon as practicable after the approval by the Secretary of the Interior of his enrollment as herein provided, land equal in value to one hundred and ten acres of the average allottable lands of the Cherokee Nation, to conform as nearly as may be to the areas and boundaries established by the Government survey, which land may be selected by each allottee so as to include his improvements.

* * * * *

SEC. 21. Allotment certificates issued by the Dawes Commission shall be conclusive evidence of the right of an allottee to the tract of land described therein, and the United States Indian agent for the Union Agency shall, under the direction of the Secretary of the Interior, upon the application of the allottee, place him in possession of his allotment, and shall remove therefrom all persons objectionable to him, and the acts of the Indian agent hereunder shall not be controlled by the writ or process of any court.

SEC. 22. *Exclusive jurisdiction is hereby conferred upon the Commission to the Five Civilized Tribes, under the direction of the Secretary of the Interior, to determine all matters relative to the appraisement and the allotment of lands.*

ROLL OF CITIZENSHIP.

SEC. 25. The roll of citizens of the Cherokee Nation shall be made as of September first, nineteen hundred and two, and the names of all persons then living and entitled to enrollment on that date shall be placed on said roll by the Commission to the Five Civilized Tribes.

SEC. 26. The names of all persons living on the first day of September, nineteen hundred and two, entitled to be enrolled as provided in section twenty-five hereof, shall be placed upon the roll made by said Commission, and no child born thereafter to a citizen and no white person who has intermarried with a Cherokee citizen since the sixteenth day of December, eighteen hundred and ninety-five, shall be entitled to enrollment or to participate in the distribution of the tribal property of the Cherokee Nation.

SEC. 27. *Such rolls shall in all other respects be made in strict compliance with the provisions of section twenty-one of the act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight (Thirtieth Statutes, page four hundred and ninety-five), and the act of Congress approved May thirty-first, nineteen hundred (Thirty-first Statutes, page two hundred and twenty-one).*

SEC. 28. No person whose name appears upon the roll made by the Dawes Commission as a citizen or freedman of any other tribe shall be enrolled as a citizen of the Cherokee Nation.

SEC. 29. For the purpose of expediting the enrollment of the Cherokee citizens and the allotment of lands as herein provided, the said Commission shall, from time to time, and as soon as practicable, forward to the Secretary of the Interior lists upon which shall be placed the names of those persons found by

the Commission to be entitled to enrollment. *The lists thus prepared, when approved by the Secretary of the Interior, shall constitute a part and parcel of the final roll of citizens of the Cherokee tribe upon which allotment of land and distribution of other tribal property shall be made. When there shall have been submitted to and approved by the Secretary of the Interior lists embracing the names of all those lawfully entitled to enrollment the roll shall be deemed complete.* The roll so prepared shall be made in quadruplicate, one to be deposited with the Secretary of the Interior, one with the Commissioner of Indian Affairs, one with the principal chief of the Cherokee Nation, and one to remain with the Commission to the Five Civilized Tribes.

SEC. 30. During the months of September and October, in the year nineteen hundred and two, the Commission to the Five Civilized Tribes may receive applications for enrollment of such infant children as may have been born to recognized and enrolled citizens of the Cherokee Nation on or before the first day of September, nineteen hundred and two, but the application of no person whomsoever for enrollment shall be received after the thirty-first day of October, nineteen hundred and two.

SEC. 31. No person whose name does not appear upon the roll prepared as herein provided shall be entitled to in any manner participate in the distribution of the common property of the Cherokee tribe, and those whose names appear thereon shall participate in the manner set forth in this act. * * *

* * * * *

TITLES.

SEC. 58. The Secretary of the Interior shall furnish the principal chief with blank patents necessary

for all conveyances herein provided for, and when any citizen receives his allotment of land, or when any allotment has been so ascertained and fixed that title should under the provisions of this act be conveyed, the principal chief shall thereupon proceed to execute and deliver to him a patent conveying all the right, title, and interest of the Cherokee Nation and of all other citizens in and to the lands embraced in his allotment certificate.

SEC. 59. *All conveyances shall be approved by the Secretary of the Interior, which shall serve as a relinquishment to the grantee of all the right, title, and interest of the United States in and to the lands embraced in his patent.*

SEC. 60. Any allottee accepting such patent shall be deemed to assent to the allotment and conveyance of all lands of the tribe as provided in this act, and to relinquish all his right, title, and interest to the same, except in the proceeds of lands reserved from allotment.

SEC. 61. The acceptance of patents for minors and incompetents by persons authorized to select their allotments for them shall be deemed sufficient to bind such minors and incompetents as to the conveyance of all other lands of the tribe.

SEC. 62. All patents, when so executed and approved, shall be filed in the office of the Dawes Commission and recorded in a book provided for the purpose, until such time as Congress shall make other suitable provision for record of land titles, without expense to the grantee, and such records shall have like effect as other public records.

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# In the Supreme Court of the United States.

OCTOBER TERM, 1908.

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|---|---|
| JAMES RUDOLPH GARFIELD, SECRETARY OF the Interior, plaintiff in error, *v.* THE UNITED STATES OF AMERICA EX REL. Ida Allison. | No. 249. |
| JAMES RUDOLPH GARFIELD, SECRETARY OF the Interior, plaintiff in error, *v.* THE UNITED STATES OF AMERICA EX REL. George A. Allison. | No. 250. |

MEMORANDUM.

Our attention has been called to the fact that on July 1, 1902, a statute was passed by Congress embodying an agreement between the United States and the Cherokee Nation, which contained provisions with reference to the enrollment of citizens of that nation and the approval by the Secretary of the Interior of partial lists, practically identical with the agreement between the United States and the Choctaw and Chickasaw nations, which was confirmed by act of Congress on the same day. (32 Stat., 716–720.)

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Therefore the arguments advanced by us that the power of the Secretary with reference to the citizenship rolls of the Cherokee Nation is different from his power with reference to the Choctaw and Chickasaw nations, and which appear on pages 9–12 of the supplemental brief, are not warranted and are hereby withdrawn.

This oversight was due to the multiplicity of acts bearing upon the questions involved in these cases, and the fact that those who represent the Government in this court did not appear on the hearings in the courts below.

Respectfully submitted.

CHARLES J. BONAPARTE,
*Attorney-General.*

JAMES A. FOWLER,
*Assistant Attorney-General.*

NOVEMBER, 1908.

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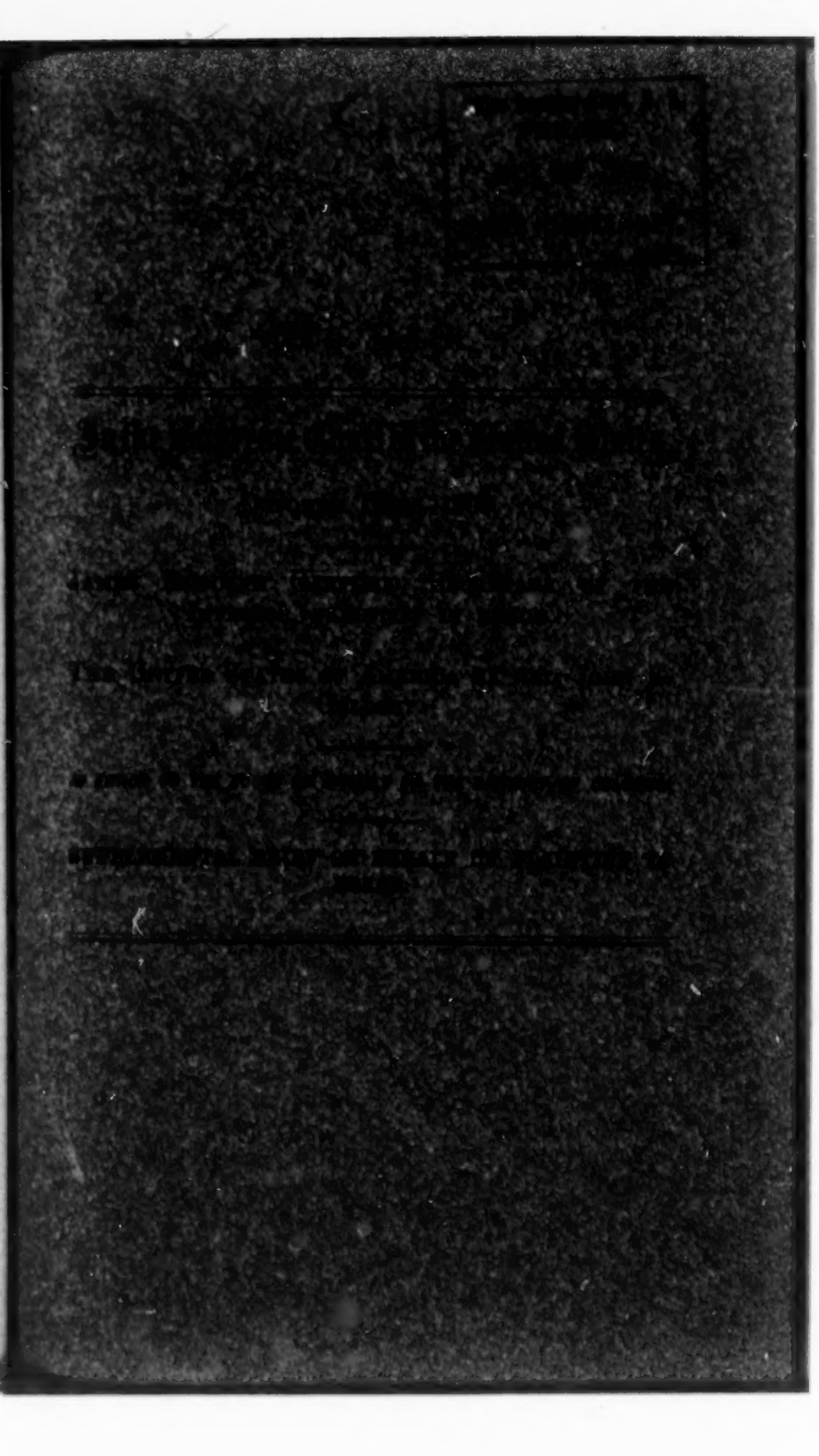

# In the Supreme Court of the United States.

OCTOBER TERM, 1908.

JAMES RUDOLPH GARFIELD, SECRETARY of the Interior, plaintiff in error,
*v.*
THE UNITED STATES OF AMERICA EX REL. John E. Goldsby.

No. 248.

## SUPPLEMENTAL BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

### I.

### ANALYSIS OF THE PLEADINGS.

As this case is tried upon petition, answer, and demurrer, the facts must be ascertained from the pleadings, including of course the exhibits made parts thereof. The first paragraph of the petition alleges that the petitioner is a citizen, member and resident of the Chickasaw Nation and a Chickasaw Indian by blood. (R., p. 1.) The first paragraph of the answer denies that the petitioner is a member of the Chickasaw Nation. (R., p. 24.) The fifth paragraph of the petition alleges that the petitioner is and likewise has been long recognized by the Choctaw and Chickasaw nations as a Chickasaw Indian by blood and is one of the heirs of the Indians referred to in the treaty of

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1856, and as such was entitled, prior to allotment, to an equal undivided interest in the lands of the Choctaw and Chickasaw nations, and is now owner of an allotment of land in the Chickasaw Nation and entitled to share in the funds and surplus lands of the Choctaw and Chickasaw nations after allotment. The fifth paragraph of the answer (R., p. 25) denies that the petitioner is a member of the Chickasaw Nation, denies that he has acquired vested right to any specific tract or allotment of land in said nation, or that he is duly enrolled as a member of said nation and therefore entitled to a distributive share in the funds and surplus lands of said nation.

Paragraph 7 of the petition (R., pp. 6, 7) avers that the Secretary of the Interior, on October 6, 1905, affirmed a decision by the Commission to the Five Civilized Tribes holding that petitioner and his children were entitled to enrollment. The entries showing such enrollment are embodied in the paragraph which further alleges that the roll was, on the 27th of March, 1906, duly and regularly approved by the then lawful incumbent of the office of Secretary of the Interior, "as evidenced by the following genuine and regular notation at the bottom of said approved final roll." The notation however, shows the approval to have been made on November 27, 1905, and by Thomas Ryan, not as Acting Secretary of the Interior, but as First Assistant Secretary of the Interior. On this point the petition says, further:

> That Thomas Ryan at this time was, and still is, First Assistant Secretary of the Interior,

> and at the time of approval of said roll was authorized by law and by the then Secretary of the Interior to approve said roll and affix his (said Ryan's) signature thereto as evidencing the due and regular approval of said roll.

A reference is then made to the Petitioner's Exhibit A–2, which consists of two letters, one from the Commission to the Five Civilized Tribes to the Secretary of the Interior, dated May 23, 1905, and one from the Acting Secretary of the Interior to the commission, dated October 6, 1905. From these letters (R., p. 18) it appears that on September 23, 1904, the Commission to the Five Civilized Tribes dismissed an application of the petitioner to be enrolled as a Chickasaw citizen, and also one for the enrollment of one Sadie Goldsby as a citizen of the said nation by intermarriage; that on April 2, 1905, the commission was instructed by the Department of the Interior to rescind its said action, except as to the said Sadie Goldsby, and to enroll petitioner in this case as a Chickasaw citizen, and that on either May 23 or 24, 1905 (the dates given in the two letters are inconsistent), the commission complied with these instructions, and that, on October 6, 1905, the department affirmed the last-mentioned action of the commission.

Section 7 of the answer admits that the decision of the Commission to the Five Civilized Tribes holding the petitioner was entitled to be enrolled as a member by blood of the Chickasaw Nation was approved on October 6, 1905, by the Acting Secretary of the Interior, and that his name was placed on a partial list

of the said members which was approved by the First Assistant Secretary of the Interior on November 27, 1905, but avers that subsequently the name of petitioner was duly stricken from the said roll by the Secretary of the Interior.

In paragraph 11 of the answer (Record, p. 27) there is the following passage:

> Further answering, respondent says that petitioner applied in 1896 to the Commissioner to the Five Civilized Tribes to be admitted and enrolled as a citizen of the Chickasaw Nation under the act of June 10, 1896 (Stats., 29, 329), and his application was allowed; that the Chickasaw Nation appealed from the judgment of the commissioner to the United States Court, Southern Division, Indian Territory, which approved the same; that thereafter the judgment of the United States Court was annulled by the citizenship court in the test suit provided for by the agreement with the Choctaw and Chickasaw nations ratified by the act of Congress of July 1, 1902 (Stats., 32, 641–646); that petitioner failed to remove his case to the citizenship court for final determination as provided by said act; and that thereafter the Commissioner to the Five Tribes and Secretary of the Interior had no jurisdiction to enroll petitioner.

**The record does not show that Goldsby's name was upon the tribal rolls.**

It is stated repeatedly in the brief for the appellee, and the same statement has been made several times in argument by his counsel, that the name of the

petitioner was, in fact, on one of the tribal rolls which, as he says, were confirmed by the act of 1896, so that there was no jurisdiction in the Commission to the Five Civilized Tribes to enroll him as a member under the same act, and their action in so doing was null and void, it being thereupon argued that, since the commission had no jurisdiction to enroll the petitioner, the Chickasaw Nation was not entitled to appeal from his enrollment to the district court, and he was not one of the court claimants referred to in the clauses of the agreement of 1902, establishing the citizenship court.

This contention was made in the case of *Myrtie Randolph and W. J. Thompson*, determined in the opinion of February 19, 1908, which is respectfully submitted to the court, not, of course, as an authority, but as an answer to the appellee's argument on this point. But, whatever might be the merits of this argument if it were sustained by the facts, it seems perfectly plain that, as the facts are presented to this court, there is nothing whatever in the record to show that the name of petitioner was ever on the tribal roll. He does not say so in his petition, and there is nothing in anything alleged either in the petition, the answer, or the exhibits from which this fact can be inferred. On the contrary, it appears by the passage cited from paragraph 11 of the answer, which, in so far as it amounts to an averment of matters of fact, is admitted to be true by the demurrer, that the petitioner applied to the Commission to the Five Civilized Tribes to be "admitted

and enrolled as a citizen of the Chickasaw Nation under the act of June 10, 1896." It further appears that his application was allowed by the commission; that the Chickasaw Nation applied to the District Court where the action of the commission was affirmed, and that this was one of the judgments annulled and vacated by the decision of the citizenship court in the test case brought under the provisions of the act of 1902. It is impossible to escape the conclusion that, upon the facts shown by the record before the court, the petitioner was one of the judicial claimants to whom the act of 1902 referred.

## II.

### ACTS OF CONGRESS.

The statutes which have a material bearing upon the defense that the judgment of the District Court in Goldsby's favor was nullified by the decree of the Citizenship Court, and therefore the commission and the Secretary of the Interior thereafter had no power to enroll him, are the following:

Act of June 10, 1896 (29 Stat., 339):

> In the performance of such duties said commission shall have power and authority to administer oaths, to issue processes for and compel the attendance of witnesses, and to send for persons and papers, and all depositions and affidavits and other evidence in any form whatsoever heretofore taken where the witnesses giving said testimony are dead or now residing beyond the limits of said Territory, and to use every fair and reasonable

means within their reach for the purpose of determining the rights of persons claiming such citizenship, or to protect any of said nations from fraud or wrong, and the rolls so prepared by them shall be hereafter held and considered to be the true and correct rolls of persons entitled to the rights of citizenship in said several tribes: *Provided*, That if the tribe, or any person, be aggrieved with the decision of the tribal authorities or the commission provided for in this act, it or he may appeal from such decision to the United States District Court: *Provided, however*, That the appeal shall be taken within sixty days, and the judgment of the court shall be final.

Section 27, act of July 1, 1902 (32 Stat., 646):

The rolls of the Choctaw and Chickasaw citizens and Choctaw and Chickasaw freedmen shall be made by the Commission to the Five Civilized Tribes in strict compliance with the act of Congress approved June 28, 1898 (30 Stat., 495), and the act of Congress approved May 31, 1900 (31 Stat., 221), except as herein otherwise provided: *Provided, That no person claiming right to enrollment and allotment and distribution of tribal property, by virtue of a judgment of the United States court in the Indian Territory under the act of June 10, 1896 (29 Stat., 321), and which right is contested by legal proceedings instituted under the provisions of this agreement, shall be enrolled or receive allotment of lands or distribution of tribal property until his right thereto has been finally determined.*

Section 31, id., after setting out in detail the contentions of the Choctaw and Chickasaw nations with reference to the validity of a certain class of judgments which had been pronounced in favor of claimants in the District Court, and providing a method by which, and a court in which said controversy should be settled, then provided that—

> Said suit shall be determined at the earliest practicable time, shall be confined to a final determination of the questions of law here named, and shall be without prejudice to the determination of any charge or claim that the admission of such persons to citizenship or enrollment by said United States courts in the Indian Territory was wrongfully obtained as provided in the next section. In the event said citizenship judgments or decisions *are annulled or vacated* in the test suit hereinbefore authorized, because of either or both of the irregularities claimed and insisted upon by said nations as aforesaid, then the files, papers, and proceedings in any citizenship case in which the *judgment or decision is so annulled or vacated*, shall, upon written application therefor, made within ninety days thereafter *by any party thereto who is thus deprived of a favorable judgment upon his claimed citizenship*, be transferred and certified to said citizenship court by the court having custody and control of such files, papers, and proceedings in any such citizenship case, accompanied by due proof that notice in writing of the transfer and certification thereof has been given to the chief executive officer of each of said nations,

> said citizenship case shall be docketed in said citizenship court, and such further proceedings shall be had therein in that court as ought to have been had in the court to which the same was taken on appeal from the Commission to the Five Civilized Tribes and as if no judgment or decision had been rendered therein.

Section 32 of the act of July 1, 1902, provided that said Citizenship Court should also have appellate jurisdiction over all judgments of the courts in the Indian Territory rendered under the act of Congress of June 10, 1896, admitting persons to citizenship or to enrollment as citizens in either of said nations; and that the right of appeal might be exercised by the said nations jointly or by either of them acting separately at any time within six months after the passage of said act, and defined the jurisdiction of the court and the manner in which it should proceed.

From reading sections 31 and 32 together, it appears that there were two classes of cases in which judgments had been pronounced by the District Court. In one of them it was insisted by the Choctaw and Chickasaw nations that the judgments were void for the reasons specified in section 31; and it was provided that the validity of those judgments should be determined in the manner stated in said section, and that in case they should be held invalid the question of citizenship of the parties concerned should be determined according to the method therein prescribed. As to the other class of judgments, it was not insisted by those nations that they were void, yet under this act and agreement the nations were

allowed to take appeals to the Citizenship Court from those judgments, the same to be prosecuted in the manner and within the time specified in said section 32.

Section 33 of said act created the citizenship court, declared the number of judges of whom it should be composed, and how appointed, defined its powers, methods of procedure, etc., and, among other things, specified that the existence of said court should terminate upon the final determination of the suits and proceedings named in sections 31 and 32; "but in no event later than the thirty-first day of December, nineteen hundred and three," and provided that, "the judgment of the citizenship court in any or all of the suits or proceedings so committed to its jurisdiction shall be final."

## III.

### STATUS OF PETITIONER.

This petitioner was a person claiming under a decision of a district court of the Indian Territory, and after the judgment in his favor had been annulled he failed to remove his case to the citizenship court, as provided in section 31. It seems perfectly clear that he is one of the class of persons who were denied enrollment or allotment until their rights had been determined by the citizenship court. He failed to secure this determination while the court was in existence, and when it ceased to exist, he could only

become entitled to enrollment by virtue of congressional action in his favor subsequent to the act of 1902.

It is true that he here claims he might have been enrolled under the act of 1898; but, as a matter of fact, he was enrolled under the act of 1896, according to the record in this case, and was one of the judicial claimants made subject to the provisions of the subsequent act of 1902. Whatever might have been his position under a different state of facts from that disclosed by this record, upon the facts of the record he appears to have been clearly and finally barred from all right to enrollment or to receive allotment through his own failure to take advantage of the provisions of section 31 of the act of 1902.

If these views are well founded, it seems obvious that the Commission to the Five Civilized Tribes were right when they dismissed his application for enrollment on September 23, 1904; that the Department of the Interior was in error when it instructed the commission on April 2, 1905, to reverse its action; that both the commission and the department erred, the former in admitting the petitioner to enrollment on May 24, 1905, and the latter in approving this decision on October 6, 1905; and that the actual enrollment of the petitioner, whether made on November 27, 1905, or March 27, 1906, and its approval by First Assistant Secretary of the Interior Ryan, were wholly unauthorized acts and void in law.

The constitutionality of the act of 1902 in creating the citizenship court and conferring upon it the power to review the judgments of the District Court was sustained by this court in *Stephens* v. *The Cherokee Nation* (174 U. S., 445); and it was held in *Wallace* v. *Adams* (204 U. S., 415), affirming the Circuit Court of Appeals of the Eighth Circuit (143 Fed., 716), that a judgment of said District Court in favor of a claimant was rendered void by the decree of said citizenship court.

## IV.

**Grounds upon which petitioner seeks to avoid the defense that the decree of the Citizenship Court is conclusive.**

First. Petitioner insists that the Commission to the Five Civilized Tribes, in passing upon his application for citizenship, on May 23, 1905, and the Secretary of the Interior, in attempting to approve their action, were acting in a judicial capacity; that they had jurisdiction of the parties in interest and also of the subject-matter, and that even though they may have committed an error, their action was not void and can not be collaterally attacked.

This contention can not be maintained, because, as above shown, in so far as Goldsby and the other persons who had obtained the character of judgments in the district court that are described in section 31 of the act of July 1, 1902, were concerned, neither the Dawes Commission nor the Secretary of the Interior was, after the passage of that act, vested with any judicial or discretionary powers. That class of

persons was singled out and provided for in said section 31, and a special tribunal—the Citizenship Court—was created by the act to hear and determine their causes in case their judgments obtained in the District Court should be annulled; and a method of relief was expressly provided therein. In order that there might be no misunderstanding as to whether or not the commission had concurrent jurisdiction with this citizenship court in these matters, or whether they might hear independent applications from these same parties, it was furthermore stipulated and enacted in section 27, that none of those parties should be enrolled by the commission until their rights had been determined, this class of applicants being expressly excepted from the directions to the commission that they should proceed with the enrollment under the acts of June 28, 1898, and May 31, 1900.

Under section 31 it was necessary for Goldsby, or anyone in his class who was deprived of his judgment by the decision of the citizenship court, to make proper application for the removal of his case into said court within ninety days after the decree invalidating said judgment. Under section 33 of said act the existence of the Citizenship Court expired December 31, 1903, but Goldsby not only made no application to have his case removed into and determined by this court within the time allowed, but waited for more than a year after the court had passed out of existence to file his application with the commission.

It was suggested that the decree of the citizenship court declaring void the class of judgments, the validity of which was submitted to them, did not affect Goldsby, because both the commission and the District Court had decided in his favor.

We are unable to see any distinction in principle between this case and that of *Wallace* v. *Adams* (204 U. S., 415). In that case, one Hill made application for citizenship to the commission, but was rejected. From this order an appeal was prosecuted to the District Court, and he there procured a judgment in his favor. It was held both by the Circuit Court of Appeals of the Eighth Circuit (143 Fed., 716) and by this court that Hill's judgment in the District Court was nullified by the decree of the citizenship court. While in the present case Goldsby's application to the commission was allowed and an appeal was taken by the Chickasaw tribe, yet by virtue of the appeal, the judgment of the commission was vacated, and the case was removed to the District Court and stood there in precisely the same condition as did Hill's case.

It was further suggested by counsel for petitioner that inasmuch as both the former judgments had been in favor of Goldsby, it was the duty of the tribe to make application and remove the case into the citizenship court. But under section 31 of the act of July 1, 1902, the tribe could not remove Goldsby's case into the District Court. The

language used therein with reference to the removal of the case, to wit:

> Upon written application therefor made within ninety days thereafter *by any party thereto who is thus deprived of a favorable judgment upon his claim of citizenship,*

necessarily excludes the idea that any such duty rested upon the Chickasaw tribe. It was Goldsby who was deprived of his judgment by the decree of the citizenship court, and not the tribe.

From the class of judgments to which reference is had in *section 32*, it was the duty of the tribe to appeal, but that section has no bearing upon the class of judgments of which Goldsby's was one.

We insist, therefore, that inasmuch as the commission and the Secretary of the Interior had no jurisdiction over the application of Goldsby, which was made in 1905, the entering of his name upon the roll by the Secretary of the Interior was a nullity.

In further support of this proposition we cite the following authorities:

In *United States* v. *Walker* (109 U. S., 258, 265) it was held that a decree by the Supreme Court of the District of Columbia directing an administrator who had been removed to pay over to an administrator *de bonis non* a sum collected by the former from the United States for a claim due to the intestate, was void for want of jurisdiction, and furnished no ground for maintaining an action against the surety of the

former administrator for failure of that administrator to comply with the decree. In that case it was insisted that the judgment could not be collaterally attacked; but the court said:

> We are of the opinion that in making the order referred to, the Supreme Court of the District exceeded its jurisdiction, and that this order is for that reason void.

In *Bigelow* v. *Forrest* (9 Wall., 339, 351), it was held, that under the act of July 17, 1862, and the joint resolution of the same date, authorizing the confiscation of the property of rebels, all that could be sold by virtue of a decree of condemnation and order of sale under the act was a right to the property seized, terminating with the life of the person for whose offenses it had been seized, and it was held that a decree pronounced in proceedings instituted under said statute which purported to convey a fee-simple title was a nullity, so far as the remainder estate was concerned, and only conveyed a life estate, the court saying:

> It is argued, however, on behalf of the plaintiff in error that the decree of confiscation in the district court of the United States is conclusive that the entire right, title, interest, and estate of Frenchwood Forrest was condemned and ordered to be sold, and as his interest was a fee simple, the entire fee was confiscated and sold. Doubtless a decree of a court having jurisdiction to make the decree can not be impeached collaterally, but under the act of Congress *the district court had no*

> *power to order a sale which would confer upon the purchaser rights outlasting the life of Frenchwood Forrest; had it done so it would have transcended its jurisdiction.*

In *Horn* v. *Lockhart* (17 Wall., 570, 580) it was held, that in a suit brought in the Circuit Court of the United States by legatees in a will to compel an executor to account for moneys received by him from sales of property belonging to the estate of his testator, and pay them their distributive shares, it was no answer for the executor to show that he invested such funds in the bonds of the Confederate government by authority of law of the State in which he was executor, and that said investment was approved by the decree of the probate court having settlement of the estate. After conceding the validity of decrees pronounced by courts maintained in the seceding States, the court said:

> The validity of the action of the probate court of Alabama in the present case in the settlement of the accounts of the executor we do not question, except so far as it approved the investment of funds received by him in Confederate bonds, and directs payment to the legatees of their distributive shares in those bonds. Its action in this respect was an absolute nullity and can afford no protection to the executor in the courts of the United States.

Second. It is also insisted that the provisions of the act of 1896 with reference to the enrollment of citizens was broadened by the acts of June 7, 1897,

and June 20, 1898, and that Goldsby had a right to disregard the proceedings which he had instituted under the act of 1896, and to institute new proceedings under the provisions of the subsequent acts.

The letter of the Secretary of the Interior, dated October 6, 1905, and addressed to the Commission to the Five Civilized Tribes, states that Goldsby's enrollment was made under the act of 1898 (R., p. 18). However, as above shown, the method by which this particular class of claimants could perfect their claims, if just, was provided for in the act of July 1, 1902; and it is clear, from the comprehensive provisions of that agreement between the United States and the Five Civilized Tribes, which was ratified by act of Congress, that this particular remedy as to these parties was exclusive. This is shown not only in section 27, in which the commission was prohibited from enrolling them until their rights should be determined, but also by section 35, in which it was stipulated that no person whose name did not appear upon the rolls prepared "*as herein provided*" should be entitled to in any manner participate in the distribution of the common property of the Choctaw and Chickasaw tribes.

Furthermore, the contention that when he had applied for citizenship and had been rejected under the act of 1896 he could thereafter again apply under the act of 1898, arises under a misapprehension of the scope and purposes of those several acts. Each successive act extended the power of the commission to examine into the validity of claims of

citizenship, and was more favorable to the tribes and less favorable to the individual claimants; and the purpose of each act was, *not to give an opportunity to a claimant who had been rejected to make another application, but to afford the tribes an opportunity to contest the claims of certain classes of persons, whose claims could not be contested under the previous acts.*

Third. Petitioner next insists that under the act of 1896 all tribal rolls were confirmed, and that Goldsby was on the tribal roll of the Chickasaw Nation, and thereby became a citizen of said nation by the express provision of the statute, and that the attempt of the commission and of the district judge to pass upon his citizenship was without authority and void, and that consequently his right to make application in 1905 was not affected by the decree of the citizenship court nullifying the judgment in his favor in the District Court.

We have heretofore shown that the record does not disclose the fact that Goldsby's name was on the tribal roll, but that the answer, in effect, positively denies the fact. The broad denial in the answer, that Goldsby "is duly enrolled as a member of said nation upon the rolls prepared by the Commission to the Five Civilized Tribes and the Secretary of the Interior as provided by law," is a denial of the existence of any fact or set of facts which would give validity to Goldsby's enrollment; and if the act of 1896 had the effect claimed by Goldsby with reference to those who were on tribal rolls, then said general

denial in the answer was equivalent to a denial that he was on a tribal roll. Furthermore, if petitioner had alleged in his petition that he was on the tribal roll, yet he would have been put upon proof of that fact, inasmuch as it was not admitted in the answer.

*United States* v. *Low* (16 Pet., 162, 168).
*Brown* v. *Pierce* (7 Wall., 205, 211).

But a glance at his petition will show that he relies therein solely upon his enrollment made by the commission on May 23, 1905, and which was attempted to be confirmed by the Secretary of the Interior on October 5, 1905, and that he does not intimate therein that his name was upon a tribal roll, or *suggest anywhere in the petition that he relies upon that fact as giving him any right to maintain this action.*

We further insist that even if his name had appeared upon a tribal roll, he had a perfect right to waive any advantage thus arising to him and apply to the commission to have his name placed upon the roll, and from such order the Chickasaw tribe had a right to appeal to the District Court, and inasmuch as he chose to take that course he was bound thereby.

Moreover, the conclusiveness of tribal rolls was finally repealed (except as to the Cherokee roll of 1880) by the act of June 28, 1898, seven years before the petitioner was enrolled by the commission. For a full statement of our position upon this point, see the opinion of the Attorney-General appended hereto.

Fourth. Petitioner further insists that whatever effect might or might not be given to the action of the commission and the Secretary of the Interior in enrolling him in 1905, or of the Secretary of the Interior in striking his name from the rolls in 1907, his rights in the land for which he has received a certificate of allotment are made conclusive by section 23 of the act of 1902, wherein it is provided that—

> Allotment certificates issued by the commission to the Five Civilized Tribes shall be conclusive evidence of the right of any allottee to the tract of land described therein.

It is apparent, however, from a reading of the entire act and agreement, that the validity of the allotment certificate was intended to depend upon the validity of the enrollment, and this is especially true as to the particular class of claimants to which Goldsby belongs. In section 27 of said agreement and act the commission was not only prohibited from *enrolling* persons who were claiming under a judgment of the District Court, of the character described in section 31, but it was provided that such persons should not "receive *allotments of land or distribution of tribal property* until his right thereto has been finally determined;" and consequently any attempt to issue an allotment certificate before the statutory provisions had been complied with was a nullity.

In the second place, if Goldsby were, by virtue of said section 23, vested with the title to, or an equitable right in, the land allotted to him, yet he could not

maintain this action against the Secretary of the Interior to compel him to reinstate his name upon the rolls. His right in said land is a question for determination in a case brought for that purpose against the proper party and in the proper tribunal. The courts of the District of Columbia have no jurisdiction to determine the validity of titles to lands lying in the Indian Territory, nor can Goldsby have adjudicated his title thereto in a proceeding brought against the Secretary of the Interior. Moreover, while section 23 does declare that the allotment certificate is conclusive evidence of the right of the allottee to the tract of land described therein, yet it does not give the allottee the right to participate in the distribution of the general fund; and in section 35 of said agreement and act it is provided that "no person whose name does not appear upon the rolls prepared, *as herein provided*, shall be entitled to in any manner participate in the distribution of the common property of the Choctaw and Chickasaw tribes, and those whose names appear thereon shall participate in the manner set forth in this agreement."

Consequently it is essential not only that his name should appear upon the rolls, but also that it should have been placed there according to the regulations provided in said act, in order for him to participate in the distribution of the general fund; and since, as above shown, his name was never legally upon the roll, it should not be reinstated, and he thus secure a distribution in the general fund, even though the

statute might vest him (which we deny) with the legal or an equitable title to the land described in his allotment certificate.

Fifth. It is also urged that, admitting these acts to have been illegal and void, there was nevertheless no authority conferred upon the Secretary of the Interior to correct this error in the rolls, at least without notice to the petitioner and an opportunity for a hearing.

Conceding, for the sake of argument only, that there is such want of authority, it is respectfully submitted that the result of the Secretary's action on March 4, 1907 (even if it be admitted that such action was itself unauthorized), being merely to put back the rolls in the condition in which they ought to have been, his successor will not be compelled by mandamus to do something which ought not to be done now. It is well recognized that the writ of mandamus is not one granted *ex debito justitiæ*, but its allowance rests in the sound discretion of the court (*Union Pacific Railroad Company* v. *Hall*, 91 U. S., p. 356); and it is equally well settled that it will not be granted to correct irregular or unauthorized action by a public official when it appears from the face of the record that the result of this action has been to do justice, and that obedience to the mandamus would involve injustice.

*Wiedwald* v. *Dodson*, 95 Cal., 450.
*State* v. *Phillips County*, 26 Kans., 419.
*State* v. *Beck*, 57 Pac., 935.

*Allen* v. *Robinson*, 17 Minn., 113.
*Van Akin* v. *Dunn*, 117 Mich., 421.
*O'Hara* v. *Fagin*, 56 N. J. L., 279.

In *Wiedwald* v. *Dodson* (95 Cal., 450) a petition was filed to compel the trustees of a town to submit to a vote the question whether a certain territory should be excluded from the town limits. The statute positively required the question to be submitted on application, but it appeared that the territory described in the application included nearly all of the town, and the petition was therefore dismissed, the court holding that

> The writ of *mandamus* is not wholly a writ of right, but lies to a considerable extent within the sound discretion of the court where the application is made, and should not issue to compel a technical compliance with the letter of the law, in violation of its plain intent and spirit, nor to wrest a statute from its true purpose.

In *State* v. *Phillips County* (26 Kans., 419), it was sought to compel the board of county commissioners to order an election for the relocation of a county seat. There was an act which required such question to be submitted upon the presentation of a petition signed by three-fifths of the electors, and further provided that "for the purposes of this act the number of legal electors shall be ascertained from the last assessment rolls of the several township assessors in the county." This statute was strictly complied with in the petition, but it appeared from the *personal property statements*

that three-fifths of all the legal voters had not signed the petition, and the petition for a writ of mandamus was therefore dismissed; the court saying:

> No court should allow a writ of mandamus to compel a technical compliance with the letter of the law, when such compliance will violate the spirit of the law.

In *Van Akin* v. *Dunn* (117 Mich., 421), it was sought to enforce the payment of a warrant which had been issued for work done for a county. It appeared, however, that the work had not been done according to contract, and though the work had been accepted and the warrant therefor issued, yet the petition was dismissed upon the ground that—

> The writ of mandamus is a discretionary writ, and, while it may issue where there is a clear legal right, a court should always refuse it when the record shows the injustice of the relator's claim.

In *O'Hara* v. *Fagin* (56 N. J. L., 279), the relator sought to compel the issuance of a warrant for $250. It appeared that in a general ordinance directing the payment of salaries, which ordinance had been regularly passed and signed by the mayor, this item was embraced; but the mayor when he signed the ordinance was under the impression that this item was not included, it being his purpose not to allow the payment inasmuch as the relator had previously been overpaid more than that sum. The court denied the writ, thus stating the grounds for so doing:

> It is the practice of this court, at the instance of private interested parties, to compel municipal officers (not excepting even the mayor) to sign warrants for the payment of claims which have been duly ordered paid by the municipal authorities (citing authorities). In such cases, however, the court has always considered the claims indisputably clear *ex request bano*. If a private relator apply for a *mandamus* directing a municipal officer to perform a ministerial duty incumbent upon him by statute, the relator must clearly show not only that the defendant is bound to do the act in question, but that the relator's right to have it done is such as the law ought, on the relator's suit, to enforce. (*Nicholson Pavement Co.* v. *Mayor of Newark*, 6 Vroom, 396.) The writ can not be claimed by such relators as their right, and the court in its discretion will refuse it if circumstances appear which render the justice or propriety of its allowance doubtful. (*Clark* v. *Jersey City*, 13 Vroom, 94; *City of Paterson* v. *Barret*, 17 Vroom, 62, 67.) In the present case we think it at least doubtful that justice will be promoted by the allowance of the writ.

The case of *Allen* v. *Robinson* (17 Minn., 113) grew out of an election contest. The canvassing board decided in favor of the petitioner and certificate was issued to him. Proceedings were thereupon instituted by respondent, and the action of the board was reversed and the certificate was declared void, and from that judgment an appeal was taken by

the petitioner. By irregular proceedings the petitioner was forcibly ousted from the office while the appeal was pending, and he thereupon applied for a writ of mandamus to reinstate him. It was held by the court that the respondent was entitled to the possession of the office pending the appeal, and although the petitioner had been ejected therefrom by irregular proceedings, yet the court would not grant the writ of mandamus to reinstate him. The court said:

> The possession which he then surrendered he had no right to retain against respondent, and however irregular the writ and the proceedings under it may have been, it would be a novel ground on which to base a peremptory mandamus that the petitioner surrender a position unlawfully held, or in obedience to a regular process yielded to under compulsion or fear of violence.

In the Cyclopædia of Law and Procedure, volume 26, page 155, title "Mandamus," it is said: "The writ will not issue in support of unjust claims, although they may technically be regular." In *People ex rel. Wood* v. *Board of Assessors* (137 N. Y., 201), an error had been made by the board of assessors in charging the relator with taxes on one-fifteenth part of a piece of property he owned and the bulk of the assessment to the purchaser from him of that small fraction of the tract. The purchaser caused the assessors to change the assessment so as to correct the mistake, which it was conceded they had no legal right to do.

Nevertheless, a mandamus was refused to compel them to replace the erroneous assessment.

Again, in the case of *McQueen* v. *The Common Council of Detroit* (116 Mich., 90), the relator was a boiler inspector who was dismissed from his office without any notice or hearing. Conceding that, for these reasons, his dismissal was irregular and unauthorized by law, the court yet refused a mandamus to restore him to his position on the ground that it appeared from the record he had been frequently and grossly intoxicated while in the discharge of his official duties, and was unfit for the position he claimed.

We do not, however, admit that any necessity for notice or a hearing existed in this case, although it may be safely conceded that, had circumstances permitted, a notice and hearing would have been unobjectionable and even desirable. To claim these were necessary in truth involves begging the very question at issue. The action of the Secretary of the Interior in correcting erroneous entries he had previously made on his records as to this case, no more called for a notice and hearing than would a similar correction made by a clerk of a court of an error he discovered in the entries on his docket.

When the petitioner failed to remove his case to the citizenship court and that court ceased to exist under the limitation of time imposed by the law creating it, there was an absolute prohibition against his enrollment, and the entry of his name on the roll, by

whomsoever made, was altogether without justification in law. In other words, in the view of the law, his name was not there, and as he could acquire no vested rights through a void transaction he could not be divested of them, and no process of law was necessary in the premises.

It is further submitted that the doctrine of vested rights has really no application to questions arising under this Indian enrollment. On this subject the court is respectfully referred to pages 27, 28, and 29 of our original brief and the authorities there quoted; but even if there were vested rights involved, it is not perceived how, under the circumstances of this particular case, there could be any necessity for a hearing. The Secretary's action was based not upon any new information as to the facts, which were in no wise in dispute, but on the discovery that he had been misled as to his own powers and those of the Commission to the Five Civilized Tribes under the law.

His correction of the entries was made merely to make them conform to the opinion of the Attorney-General referred to in the records, and it is respectfully submitted that there could be, under these circumstances, no right on the part of the petitioner to submit an argument to the Secretary of the Interior controverting the views as to matters of law communicated to him by the statutory legal adviser of the Government. If the Attorney-General was wrong in his construction of the law, the only remedy

of the petitioner would be through an appeal to the courts.

For the foregoing reasons, we insist that the judgments of the Court of Appeals and the Supreme Court of the District of Columbia should be reversed, and the petition for a writ of mandamus should be dismissed.

Respectfully submitted.

CHARLES J. BONAPARTE,
*Attorney-General.*

JAMES A. FOWLER,
*Assistant Attorney-General.*

## OPINION OF ATTORNEY-GENERAL IN CASES OF MYRTIE RANDOLPH AND W. J. THOMPSON, LOULA (OR LULU) WEST, AND WILLIAM C. THOMPSON, RENDERED TO THE SECRETARY OF THE INTERIOR FEBRUARY 19, 1907.

26 Op., 127.

(*Cases of Cyrus H. Kingsbury and Lucy E. Littlepage, Richard B. Coleman and children and Ethel Pierson, considered in same opinion, omitted because irrelevant to present appeal.*)

CHOCTAW CITIZENSHIP CASES—CITIZENSHIP COURT—FINALITY OF JUDGMENT.

Myrtie Randolph and W. J. Thompson were children of a white father by his third wife, a white woman, his first and second wives having been Choctaws. Both parents and these children lived in the Choctaw Nation and were recognized and regarded as Choctaw citizens. The children were enrolled by the Choctaw Committee on Citizenship in 1892. Their application to the Commission to the Five Civilized Tribes for enrollment under the act of June 10, 1896 (29 Stat., 321, 339), was denied, which decision was reversed by the United States court in the Indian Territory, and its judgment affirmed by the Supreme Court. (174 U. S., 445, 469.) Subsequently, on appeal by the nation under the act of July 1, 1902 (32 Stat., 641, 646–649), their application was denied by the Choctaw and Chickasaw Citizenship Court. *Held*, that the citizenship court had jurisdiction and that its judgment is final.

The application for enrollment under the act of June 10, 1896 (29 Stat., 339), notwithstanding the fact that applicants

were already on the rolls, was a waiver of the conclusiveness of the rolls in their cases, the act providing that the commission shall hear and determine the application of all persons who may apply to them for citizenship in any of said nations.

The act of July 1, 1902 (32 Stat., 641), contemplated that the Citizenship Court should have a revisory jurisdiction of all judgments of the United States courts in the Indian Territory admitting persons to citizenship on appeal from the judgments of the commission, whether the applicants were on the tribal rolls or not.

No authority has been conferred upon the Secretary of the Interior by the acts of July 1, 1902, paragraph 30 (32 Stat., 646), and April 26, 1906 (34 Stat., 137), to review the judgments of the Citizenship Court.

Loula West was admitted to citizenship in the Choctaw Nation by the Commission to the Five Civilized Tribes. The nation appealed to the United States courts in the Indian Territory and the judgment was affirmed. Later, under the act of July 1, 1902 (32 Stat., 641, 647), the case was removed to the Citizenship Court, which denied her application. *Held*, that the Citizenship Court had jurisdiction of such cases, and its judgments therein are final.

William C. Thompson applied to the Commission to the Five Civilized Tribes for the enrollment of himself, wife, and children. The application was denied by the commission, and no appeal was taken therefrom. Claimant relies upon the fact that their names appear upon the tribal roll prepared pursuant to the Choctaw acts of September 18 and October 30, 1896. *Held*, that the action of the commission, not having been appealed from, was final, and that the Choctaw Nation, even if it attempted to do so, had no right thereafter to admit them, such enrollment being without authority of law.

DEPARTMENT OF JUSTICE,
*February 19, 1907.*

SIR: I have the honor to communicate to you my opinion in certain Choctaw Indian citizenship cases, the first two submitted by your letter of May 29,

1906, and the others by the direction of the President under date of January 19, 1907.

The first case is that of Myrtie Randolph and her brother, W. J. Thompson, in regard to which you say:

> Myrtie Randolph and W. J. Thompson are children of Giles Thompson, white, intermarried in the Choctaw Nation in Mississippi prior to the treaty of September 27, 1830 (7 Stat., 333), and was one of the parties named by supplementary Article II (ib. 340) as entitled to a section and a half, reserved to him from the ceded lands, to be so selected as "to include their present residence and improvement." His first and second wives were Choctaws. His name appears on page 64, volume 7, American State Papers (Public Lands), as a beneficiary of Article XIX of the treaty of September 27, 1830, and on page 28, volume 1, of the record in suit of the *Choctaw Nation* v. *United States*, Court of Claims. He was registered under the treaty as citizen of the Choctaw Nation, Mushulatubbee's District, and with his family was transported under the treaty as Choctaws, at expense of the United States, from Mississippi to the Choctaw Nation, west, prior to October 24, 1833, when he petitioned the President, from Doakesville, near the Red River, in the southern part of the Choctaw Nation, to approve sale of his Mississippi lands to James Gay, of Mississippi, and for issue of patent therefor (copy A inclosed).
>
> In the Choctaw Nation, west, in Indian Territory, in 1863, in accordance to Choctaw law, he married a white woman, citizen of the United States, of whom the applicants were born. He was living October 19, 1865, and was paid by the Choctaw Nation for beeves furnished June, 1865. (Copy of act of council of October 19, 1865, is inclosed, B.) He continued to live in the nation and

was recognized as a citizen until his death, aged 76 years, and his estate was administered in the Choctaw courts as that of an Indian and within their jurisdiction. The applicants, his children, were born in the Choctaw Nation, were admitted to and attended the Choctaw schools as Choctaws, and in all respects enjoyed and were accorded the privileges of native-born Choctaws. The applicants were enrolled by Choctaw Committee on Citizenship in 1892 as Choctaw citizens.

The Department is not yet advised whether they are borne on any other of the Choctaw rolls. They settled and improved tribal lands, as the father before had done in Mississippi, as Choctaws, erected homes, and were never ousted or objected to or regarded as intruders.

September 8, 1896, these applicants and others applied to the Commission to the Five Civilized Tribes for enrollment under the act of June 10, 1896 (29 Stat., 321, 339), and December 7, 1896, were denied. Applicants appealed to the United States Court, Southern District, Indian Territory, which, January 18, 1898, reversed the Commission and admitted the applicants.

From this judgment the nation appealed and the judgment was affirmed (reported as *Stephens* v. *Cherokee Nation* and *Choctaw Nation* v. *Robinson*, 174 U. S., 445, footnote page 469, case No. 589; *Same* v. *Randolph et al.*). Subsequently, under the act of July 1, 1902 (32 Stat., 641, 646–9), the matter was brought by appeal of the nations to the Choctaw-Chickasaw Citizenship Court, which, November 29, 1904, denied the application—copy of opinion therein, and in *Wall* v. *Choctaw Nation et al.*, and in *E. H. Bounds* v. *Choctaw and Chickasaw Nations*, whereon both were founded, are inclosed (C, D, E).

The validity and finality of the Citizenship Court are therefore a vital feature of this case. In regard to its judgment you say in your letter:

> Bearing upon the validity of this judgment, your attention is called to the fact that the act of June 10, 1896, gave no power to the Commission to the Five Civilized Tribes to purge the tribal rolls, which were by the act confirmed. Power to purge the rolls was first conferred on the commission by the act of June 7, 1897 (30 Stat., 84), and further by section 21, act of June 28, 1898 (30 Stat., 495, 502). Wherefore this department holds that no jurisdiction was given the commission, or to the courts on appeal therefrom, to exclude persons having tribal recognition and borne on the tribal rolls, but that such persons, notwithstanding prior adverse action by the commission or the courts, are entitled to enrollment under the act of 1898 and supplementary acts, unless their inscription on the tribal rolls was procured by fraud or was without authority of law.
>
> Such has been the rule of this department since decision in the case of Wiley Adams, May 21, 1903, discussed and concurred in by the Assistant Attorney-General, Interior Department (Opinions of March 24, 1905), in cases of Benjamin J. Vaughn and Mary Elizabeth Martin. In Vaughn's case counsel for the nations acceded to it as the proper rule.

To determine the validity and the finality of the judgment of the Citizenship Court, as well as other questions arising in these cases, it is necessary to consider carefully the entire legislation of the Congress on this subject.

The act of June 10, 1896 (29 Stat., 321, 339), directed the Commission to the Five Civilized Tribes

in the Indian Territory to continue the exercise of the authority theretofore conferred upon them to negotiate with such tribes for the extinguishment of the tribal title to their lands, by the cession of the same or a part thereof to the United States, or their allotment in severalty to the members of such tribes, with a view to the ultimate creation of a State or States embracing such lands.

That act also provided—

> That said commission is further authorized and directed to proceed at once to hear and determine the applications of all persons who may apply to them for citizenship in any of said nations, and after such hearing they shall determine the right of such applicant to be so admitted and enrolled: *Provided, however*, That such application shall be made to such commissioners within three months after the passage of this act. The said commission shall decide all such applications within ninety days after the same shall be made. That in determining all such applications said commission shall respect all laws of the several nations or tribes, not inconsistent with the laws of the United States, and all treaties with either of said nations or tribes, and shall give due force and effect to the rolls, usages, and customs of each of said nations or tribes: *And provided further*, That the rolls of citizenship of the several tribes as now existing are hereby confirmed, and any person who shall claim to be entitled to be added to said rolls as a citizen of either of said tribes and whose right thereto has either been denied or not acted upon, or any citizen who may within three months from and after the passage of this act desire such citizenship, may apply to the legally constituted court or committee designated by

the several tribes for such citizenship, and such court or committee shall determine such application within thirty days from the date thereof.

In the performance of such duties said commission shall have power and authority to administer oaths, to issue process for and compel the attendance of witnesses, and to send for persons and papers, and all depositions and affidavits and other evidence in any form whatsoever heretofore taken where the witnesses giving said testimony are dead or now residing beyond the limits of said Territory, and to use every fair and reasonable means within their reach for the purpose of determining the rights of persons claiming such citizenship, or to protect any of said nations from fraud or wrong, and the rolls so prepared by them shall be hereafter held and considered to be the true and correct rolls of persons entitled to the rights of citizenship in said several tribes: *Provided*, That if the tribe, or any person, be aggrieved with the decision of the tribal authorities or the commission provided for in this act, it or he may appeal from such decision to the United States District Court: *Provided, however*, That the appeal shall be taken within sixty days, and the judgment of the court shall be final.

That the said commission, after the expiration of six months, shall cause a complete roll of citizenship of each of said nations to be made up from their records, and add thereto the names of citizens whose right may be conferred under this act, and said rolls shall be, and are hereby, made rolls of citizenship of said nations or tribes, subject, however, to the determination of the United States courts, as provided herein.

The commission is hereby required to file the lists of members as they finally approve

them with the Commissioner of Indian Affairs, to remain there for use as the final judgment of the duly constituted authorities.

The act of June 7, 1897 (30 Stat., 62, 84), contained this provision:

> That said commission shall continue to exercise all authority heretofore conferred on it by law to negotiate with the Five Tribes, and any agreement made by it with any one of said tribes, when ratified, shall operate to suspend any provisions of this act if in conflict therewith as to said nation: *Provided*, That the words "rolls of citizenship," as used in the act of June tenth, eighteen hundred and ninety-six, making appropriations for current and contingent expenses of the Indian Department and fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, eighteen hundred and ninety-seven, shall be construed to mean the last authenticated rolls of each tribe which have been approved by the council of the nation, and the descendants of those appearing on such rolls, and such additional names and their descendants as have been subsequently added, either by the council of such nation, the duly authorized courts thereof, or the commission under the act of June tenth, eighteen hundred and ninety-six. And all other names appearing upon such rolls shall be open to investigation by such commission for a period of six months after the passage of this act. And any name appearing on such rolls and not confirmed by the act of June tenth, eighteen hundred and ninety-six, as herein construed, may be stricken therefrom by such commission where the party affected shall have ten days' previous notice that said commission will investigate

and determine the right of such party to remain upon such roll as a citizen of such nation: *Provided, also*, That anyone whose name shall be stricken from the roll by such commission shall have the right of appeal, as provided in the act of June tenth, eighteen hundred and ninety-six.

The act of June 28, 1898 (30 Stat., 495, 502–3), provided:

SEC. 21. That in making rolls of citizenship of the several tribes, as required by law, the Commission to the Five Civilized Tribes is authorized and directed to take the roll of Cherokee citizens of eighteen hundred and eighty (not including freedmen) as the only roll intended to be confirmed by this and preceding Acts of Congress, and to enroll all persons now living whose names are found on said roll, and all descendants born since the date of said roll to persons whose names are found thereon; and all persons who have been enrolled by the tribal authorities who have heretofore made permanent settlement in the Cherokee Nation whose parents, by reason of their Cherokee blood, have been lawfully admitted to citizenship by the tribal authorities, and who were minors when their parents were so admitted; and they shall investigate the right of all other persons whose names are found on any other rolls and omit all such as may have been placed thereon by fraud or without authority of law, enrolling only such as may have lawful right thereto, and their descendants born since such rolls were made, with such inter-married white persons as may be entitled to citizenship under Cherokee laws.

* * * * *

Said commission is authorized and directed to make correct rolls of the citizens by blood

> of all the other tribes, eliminating from the tribal rolls such names as may have been placed thereon by fraud or without authority of law, enrolling such only as may have lawful right thereto, and their descendants born since such rolls were made, with such intermarried white persons as may be entitled to Choctaw and Chickasaw citizenship under the treaties and the laws of said tribes.
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> * * * * *
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> The rolls so made, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon, with their descendants thereafter born to them, with such persons as may intermarry according to tribal laws, shall alone constitute the several tribes which they represent.

The act of May 31, 1900 (31 Stat., 221, 236), provided:

> That said commission shall continue to exercise all authority heretofore conferred upon it by law. But it shall not receive, consider, or make any record of any application of any person for enrollment as a member of any tribe in Indian Territory who has not been a recognized citizen thereof, and duly and lawfully enrolled or admitted as such and its refusal of such application shall be final when approved by the Secretary of the Interior.

The act of March 3, 1901 (31 Stat., 1058, 1077), contained this provision:

> The rolls made by the Commission to the Five Civilized Tribes, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon shall alone constitute the several tribes which they represent; and the Secretary of the Interior is authorized and directed to fix a time by agreement with said tribes or either of

> them for closing said rolls, but upon failure or refusal of said tribes or any of them to agree thereto, then the Secretary of the Interior shall fix a time for closing said rolls, after which no name shall be added thereto.

The act of July 1, 1902 (32 Stat., 641), ratified an agreement made by the Commission to the Five Civilized Tribes with the commission representing the Choctaw and Chickasaw tribes. This agreement was subsequently ratified by those two nations as required therein. In regard to rolls of citizenship it provided:

> 27. The rolls of the Choctaw and Chickasaw citizens and Choctaw and Chickasaw freedmen shall be made by the Commission to the Five Civilized Tribes, in strict compliance with the act of Congress approved June 28, 1898 (30 Stats., 495), and the act of Congress approved May 31, 1900 (31 Stats., 221), except as herein otherwise provided: *Provided*, That no person claiming right to enrollment and allotment and distribution of tribal property, by virtue of a judgment of the United States court in the Indian Territory under the act of June 10, 1896 (29 Stats., 321), and which right is contested by legal proceedings instituted under the provisions of this agreement, shall be enrolled or receive allotment of lands or distribution of tribal property until his right thereto has been finally determined.
>
> 28. The names of all persons living on the date of the final ratification of this agreement entitled to be enrolled as provided in section 27 hereof shall be placed upon the rolls made by said commission; and no child born thereafter to a citizen or freedman and no person intermarried thereafter to a citizen shall be entitled to enrollment or to participate in the distribution of the tribal property of the Choctaws and Chickasaws.

29. No person whose name appears upon the rolls made by the Commission to the Five Civilized Tribes as a citizen or freedman of any other tribe shall be enrolled as a citizen or freedman of the Choctaw or Chickasaw nations.

30. For the purpose of expediting the enrollment of the Choctaw and Chickasaw citizens and Choctaw and Chickasaw freedmen, the said commission shall, from time to time, and as early as practicable, forward to the Secretary of the Interior lists upon which shall be placed the names of those persons found by the commission to be entitled to enrollment. The lists thus prepared, when approved by the Secretary of the Interior, shall constitute a part and parcel of the final rolls of citizens of the Choctaw and Chickasaw tribes and of Choctaw and Chickasaw freedmen upon which allotment of land and distribution of other tribal property shall be made as herein provided.

Lists shall be made up and forwarded when contests of whatever character shall have been determined, and when there shall have been submitted to and approved by the Secretary of the Interior lists embracing names of all those lawfully entitled to enrollment, the rolls shall be deemed complete. The rolls so prepared shall be made in quintuplicate, one to be deposited with the Secretary of the Interior, one with the Commissioner of Indian Affairs, one with the principal chief of the Choctaw Nation, one with the governor of the Chickasaw Nation, and one to remain with the Commission to the Five Civilized Tribes.

31. It being claimed and insisted by the Choctaw and Chickasaw nations that the United States courts in the Indian Territory, acting under the act of Congress approved June 10, 1896, have admitted persons to citizenship or to enrollment as such citizens in

the Choctaw and Chickasaw nations, respectively, without notice of the proceedings in such courts being given to each of said nations; and it being insisted by said nations that, in such proceedings, notice to each of said nations was indispensable, and it being claimed and insisted by said nations that the proceeding in the United States courts in the Indian Territory, under the said act of June 10, 1896, should have been confined to a review of the action of the Commission to the Five Civilized Tribes, upon the papers and evidence submitted to such commission, and should not have extended to a trial de novo of the question of citizenship; and it being desirable to finally determine these questions, the two nations, jointly, or either of said nations acting separately and making the other a party defendant, may, within ninety days after this agreement becomes effective, by a bill in equity filed in the Choctaw and Chickasaw citizenship court hereinafter named, seek the annulment and vacation of all such decisions by said courts. Ten persons so admitted to citizenship or enrollment by said courts, with notice to one but not to both of said nations, shall be made defendants to said suit as representatives of the entire class of persons similarly situated, the number of such persons being too numerous to require all of them to be made individual parties to the suit; but any person so situated may, upon his application, be made a party defendant to the suit.

Notice of the institution of said suit shall be personally served upon the chief executive of the defendant nation, if either nation be made a party defendant as aforesaid, and upon each of said ten representative defendants, and shall also be published for a period of four weeks in at least two weekly newspapers having general circulation in the Choctaw and

Chickasaw nations. Such notice shall set forth the nature and prayer of the bill, with the time for answering the same, which shall not be less than thirty days after the last publication. Said suit shall be determined at the earliest practicable time, shall be confined to a final determination of the questions of law here named, and shall be without prejudice to the determination of any charge or claim that the admission of such persons to citizenship or enrollment by said United States courts in the Indian Territory was wrongfully obtained as provided in the next section.

Oct. 21.

In the event said citizenship judgments or decisions are annulled or vacated in the test suit hereinbefore authorized, because of either or both of the irregularities claimed and insisted upon by said nations as aforesaid, then the files, papers, and proceedings in any citizenship case in which the judgment or decision is so annulled or vacated shall, upon written application therefor, made within ninety days thereafter by any party thereto who is thus deprived of a favorable judgment upon his claimed citizenship, be transferred and certified to said citizenship court by the court having custody and control of such files, papers, and proceedings, and, upon the filing in such Citizenship Court of the files, papers, and proceedings in any such citizenship case, accompanied by due proof that notice in writing of the transfer and certification thereof has been given to the chief executive officer of each of said nations, said citizenship case shall be docketed in said citizenship court, and such further proceedings shall be had therein in that court as ought to have been had in the court to which the same was taken on appeal

from the Commission to the Five Civilized Tribes, and as if no judgment or decision had been rendered therein.

32. Said Citizenship Court shall also have appellate jurisdiction over all judgments of the courts in Indian Territory rendered under said act of Congress of June tenth, eighteen hundred and ninety-six, admitting persons to citizenship or to enrollment as citizens in either of said nations. The right of appeal may be exercised by the said nations jointly or by either of them acting separately at any time within six months after this agreement is finally ratified. In the exercise of such appellate jurisdiction said Citizenship Court shall be authorized to consider, review, and revise all such judgments, both as to findings of fact and conclusions of law, and may, whenever in its judgment substantial justice will thereby be subserved, permit either party to any such appeal to take and present such further evidence as may be necessary to enable said court to determine the very right of the controversy. And said court shall have power to make all needful rules and regulations prescribing the manner of taking and conducting said appeals and of taking additional evidence therein.

Such Citizenship Court shall also have like appellate jurisdiction and authority over judgments rendered by such courts under the said act denying claims to citizenship or to enrollment as citizens in either of said nations. Such appeals shall be taken within the time hereinbefore specified and shall be taken, conducted, and disposed of in the same manner as appeals by the said nations, save that notice of appeals by citizenship claimants shall be served upon the chief executive officer of both nations: *Provided*, That paragraphs

thirty-one, thirty-two, and thirty-three hereof shall go into effect immediately after the passage of this act by Congress.

33. A court is hereby created, to be known as the Choctaw and Chickasaw Citizenship Court, the existence of which shall terminate upon the final determination of the suits and proceedings named in the last two preceding sections, but in no event later than the thirty-first day of December, nineteen hundred and three. Said court shall have all authority and power necessary to the hearing and determination of the suits and proceedings so committed to its jurisdiction, including the authority to issue and enforce all requisite writs, process, and orders, and to prescribe rules and regulations for the transaction of its business. It shall also have all the powers of a circuit court of the United States in compelling the production of books, papers, and documents, the attendance of witnesses, and in punishing contempt.

Except where herein otherwise expressly provided, the pleadings, practice, and proceedings in said court shall conform, as near as may be, to the pleadings, practice, and proceedings in equity causes in the circuit courts of the United States. The testimony shall be taken in court or before one of the judges, so far as practicable. Each judge shall be authorized to grant, in vacation or recess, interlocutory orders and to hear and dispose of interlocutory motions not affecting the substantial merits of the case. Said court shall have a chief judge and two associate judges, a clerk, a stenographer, who shall be deputy clerk, and a bailiff. The judges shall be appointed by the President, by and with the advice and consent of the Senate, and shall each receive a compensation of five thousand dollars per annum, and his necessary and actual traveling and personal expenses

while engaged in the performance of his duties.

The clerk, stenographer, and bailiff shall be appointed by the judges, or a majority of them, and shall receive the following yearly compensation: Clerk, two thousand four hundred dollars; stenographer, twelve hundred dollars; bailiff, nine hundred dollars. The compensation of all these officers shall be paid by the United States in monthly installments.

The moneys to pay said compensation are hereby appropriated, and there is also appropriated the sum of five thousand dollars, or so much thereof as may be necessary, to be expended under the direction of the Secretary of the Interior, to pay such contingent expenses of said court and its officers as to such Secretary may seem proper. Said court shall have a seal, shall sit at such place or places in the Choctaw and Chickasaw nations as the judges may designate, and shall hold public sessions, beginning the first Monday in each month, so far as may be practicable or necessary. Each judge and the clerk and deputy clerk shall be authorized to administer oaths. All writs and process issued by said court shall be served by the United States marshal for the district in which the service is to be had.

The fees for serving process and the fees of witnesses shall be paid by the party at whose instance such process is issued or such witnesses are supœnaed, and the rate or amount of such fees shall be the same as is allowed in civil causes in the Circuit Court of the United States for the Western District of Arkansas. No fees shall be charged by the clerk or other officers of said court. The clerk of the United States court in Indian Territory, having custody and control of the files, papers, and proceedings in the original citizenship cases, shall

receive a fee of two dollars and fifty cents for transferring and certifying to the citizenship court the files, papers, and proceedings in each case, without regard to the number of persons whose citizenship is involved therein, and said fee shall be paid by the person applying for such transfer and certification.

The judgment of the Citizenship Court in any or all of the suits or proceedings so committed to its jurisdiction shall be final. All expenses necessary to the proper conduct, on behalf of the nations, of the suits and proceedings provided for in this and the two preceding sections shall be incurred under the direction of the executives of the two nations, and the Secretary of the Interior is hereby authorized, upon certificate of said executives, to pay such expenses as in his judgment are reasonable and necessary out of any of the joint funds of said nations in the Treasury of the United States.

It appears that the agreement in these paragraphs provides for the establishment of the Choctaw and Chickasaw Citizenship Court, and gives it jurisdiction of a test suit to annul and vacate the decisions of the United States courts in the Indian Territory admitting persons to citizenship and enrollment as citizens of the Choctaw and Chickasaw nations, respectively, on the ground of want of notice to both of said nations and because the United States courts tried such cases *de novo*, with a right, in the event such judgments should be annulled because of either or both of the irregularities mentioned on the part of any party thus deprived of a favorable judgment to remove his case to the Citizenship Court, where such further proceedings were to be had therein "as ought to have been had in the court to which the same was taken on appeal from the Commission to the Five Civilized Tribes, and if no judgment or

decision had been rendered therein;" and also "appellate jurisdiction over all judgments of the courts in Indian Territory, rendered under said act of Congress of June tenth, eighteen hundred and ninety-six, admitting persons to citizenship or to enrollment in either of said nations."

In the exercise of such appellate jurisdiction the citizenship court was "authorized to consider, review, and revise all such judgments, both as to findings of fact and conclusions of law, and may, whenever in its judgment substantial justice will thereby be subserved, permit either party to any such appeal to take and present such further evidence as may be necessary to enable said court to determine the very right of the controversy."

It will be noted that the agreement further provides (paragraph 33) that "the judgment of the citizenship court in *any or all* of the suits or proceedings so committed to its jurisdiction *shall be final*."

The agreement also contained this provision:

> 34. During the ninety days first following the date of the final ratification of this agreement, the Commission to the Five Civilized Tribes may receive applications for enrollment only of persons whose names are on the tribal rolls, but who have not heretofore been enrolled by said commission, commonly known as "delinquents," and such intermarried white persons as may have married recognized citizens of the Choctaw and Chickasaw nations in accordance with the tribal laws, customs, and usages on or before the date of the passage of this act of Congress, and such infant children as may have been born to recognized and enrolled citizens on or before the date of the final ratification of this agreement; but the application of no person whomsoever for enrollment shall be received after the expiration of the said ninety

> days: *Provided*, That nothing in this section shall apply to any person or persons making application for enrollment as Mississippi Choctaws for whom provision has herein otherwise been made.

By the act of April 21, 1904 (33 Stat., 189, 204), it was provided that the Commission to the Five Civilized Tribes should conclude its work and terminate on or before July 1, 1905, and cease to exist on that date, the powers theretofore conferred upon it being continued.

By the act of March 3, 1905 (33 Stat., 1048, 1060), it was provided "that the work of completing the unfinished business, if any, of the Commission to the Five Civilized Tribes shall devolve upon the Secretary of the Interior, and that all the powers heretofore granted to the said Commission to the Five Civilized Tribes are hereby conferred upon the said Secretary on and after the first of July, nineteen hundred and five."

By the act of April 26, 1906 (34 Stat., 137), it was provided:

> That after the approval of this act no person shall be enrolled as a citizen or freedman of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes of Indians in the Indian Territory, except as herein otherwise provided, unless application for enrollment was made prior to December first, nineteen hundred and five, and the records in charge of the Commissioner to the Five Civilized Tribes shall be conclusive evidence as to the fact of such application; and no motion to reopen or reconsider any citizenship case, in any of said tribes, shall be entertained unless filed with the Commissioner to the Five Civilized Tribes within sixty days after the date of the order

> or decision sought to be reconsidered except as to decisions made prior to the passage of this act, in which cases such motion shall be made within sixty days after the passage of this act.

By that act the rolls of citizenship of the several tribes were required to be completed by March 4, 1907.

After very carefully considering this legislation in the light of the circumstances under which it was enacted, I am constrained to the conclusion that the Citizenship Court had jurisdiction of the cases now under consideration, and that its judgment therein is final.

By the act of June 10, 1896, the Commission to the Five Civilized Tribes was "authorized and directed to proceed at once to hear and determine the application of *all* persons who may apply to them for citizenship in any of said nations." It is true that this act also confirmed the then existing rolls of the several tribes, but the question whether an applicant was, as matter of fact, already duly enrolled upon one of the rolls so confirmed constituted, in my opinion, an issue upon which the commission was authorized and required to pass. The applicant may be fairly held to have waived by his application the conclusiveness of the confirmation of the rolls in his case.

Independently of any such waiver, I do not see how the proposition that the commission did not have jurisdiction of the case of a person whose name was upon a tribal roll can be maintained in the face of the provision of the act of June 10, 1896, that "in determining all said applications said commission shall * * * give due force and effect to the *rolls*, usages, and customs of each of said nations or tribes." I think that act left it to the commission to

determine whether or nor the applicant was upon a roll which was confirmed, and evidently it did not so hold in these cases.

It is unnecessary, however, to determine what might have been the effect of an adverse judgment in the case of an applicant whose name was upon a roll so confirmed, for such confirmation was certainly and very materially modified by the act of June 7, 1897, and apparently altogether withdrawn by the act of June 28, 1898. The act of June 7, 1897, provided that the words "rolls of citizenship" as used in the act of June 10, 1896, should be construed to mean the "last authenticated rolls of each tribe which have been approved by the council of the nation."

I am informed that there never was any such an authenticated roll of the Choctaw tribe, either at the time of the passage of the act of June 10, 1896, or subsequently thereto. Moreover, by the act of June 28, 1898, it was provided that in making rolls of citizenship of *the several* tribes, the commission should take the Cherokee roll of 1880 as *the only* roll intended to be confirmed by that and preceding acts of Congress. It seems to be clear from the further provisions of the act that the Congress did not here refer to the Cherokee rolls only, but had in mind those of all the tribes. To my mind, however, the decisive consideration is that Congress, knowing there were certain cases of contested citizenship in the Choctaw and Chickasaw nations, referred these cases, under carefully defined conditions, to the Citizenship Court and made the determination of that court in those cases final. This provision of law repealed, as to cases in this category, any inconsistent provisions (if any there were) in the act of 1896 or any other prior act.

These cases were unquestionably within the terms of the law; the claimants had been admitted to citizenship by decisions of the United States courts, and it seems clear that, under the agreement with the Choctaw and Chickasaw nations ratified by the act of July 1, 1902, it was intended that the Citizenship Court should have a revisory jurisdiction of judgments of the United States courts in the Indian Territory in citizenship cases, irrespective of the grounds on which these suits had been entertained by the said courts. That agreement was made after the confirmation given to the tribal rolls had been qualified, if not withdrawn, and, we must presume, with a knowledge of the fact that the commission, under the act of June 10, 1896, had exercised jurisdiction in the case of persons whose names appeared upon some of the rolls of the tribes.

Its action seems to show that Congress did not intend to confirm any roll of the Choctaw and Chickasaw tribes; but, however that may be, when, with a knowledge of all that had gone before, it created the citizenship court, this was done, in my opinion, with the evident purpose of giving it jurisdiction of all citizenship cases which had been decided by the United States courts for the Indian Territory on appeal from the judgments of the commission.

As neither Congress nor the nations made any distinction in the act and agreement referred to as to the cases of persons whose names were on a tribal roll which might have been confirmed by the act of June 10, 1896, if Congress had not decided otherwise, I do not think any other authority can make this distinction. Indeed, as I have suggested, the applicants themselves, having voluntarily submitted to the jurisdiction of the commission, might be fairly held estopped to now deny it.

I understand that it is not contended, nor do I think it could be successfully maintained, that any authority to review the judgments of the citizenship court was intended to be conferred upon you by Congress when it made the rolls, as finally compiled, subject to your approval (see paragraph 30 of the agreement ratified by the act of July 1, 1902). Neither do I think that the provision in the act of April 26, 1906, above quoted, as to enrolling persons and entertaining motions to reopen or reconsider citizenship cases, was intended to recognize or confer any such authority, the purpose of that provision being simply to limit the time in which the authority previously conferred might be exercised. To hold thus would be to treat the later act as a repeal of so much of the former as expressly declared the judgments of the citizenship court to be final, which seems to me untenable.

This disposes of the cases of Myrtie Randolph and her brother, W. J. Thompson. Whatever their intrinsic merits, these claims have been finally decided adversely to the claimants by the judgment of the Citizenship Court.

THE CASE OF LOULA (OR LULU) WEST ET AL.

It appears from the papers in this case that Loula West applied to the Commission to the Five Civilized Tribes, pursuant to the act of June 10, 1896, for admission to citizenship in the Choctaw Nation and was admitted as a citizen by blood; that the Choctaw Nation appealed to the United States Court for the Central District of the Indian Territory, which affirmed the judgment of the commission; that this judgment was annulled and vacated by the judgment of the citizenship court in the test case provided for by the act of July 1, 1902 (32 Stat., 641, 647), and

thereupon she removed her case to that court, which denied her application.

This case is similar to that of Myrtie Randolph and her brother, W. J. Thompson, children of Giles Thompson, above referred to, in that it involves the question of the finality of the judgment of the citizenship court, it being contended that the commission in the first instance and the Citizenship Court ultimately on appeal had no jurisdiction of the case because at the time of her application to the commission her name was upon a tribal roll.

For the reasons heretofore stated, I think this contention is not well founded, and that the Citizenship Court had jurisdiction of such cases, and its judgments therein were final.

THE CASE OF WILLIAM C. THOMPSON ET AL.

In this case the record shows that Thompson applied to the Commission to the Five Civilized Tribes, pursuant to the act of June 10, 1896, for the enrollment of himself, his wife, and children, with the exception of a daughter, Mary M. McNeese, who made a separate application for herself, her husband, a white man, and their children. The commission denied Thompson's application, and also that of his daughter. No appeal was taken from these judgments, and it is contended, on behalf of the nation, that under the act of June 10, 1896, they were final and conclusive against the right of these parties to be enrolled.

The claimants, however, rely upon the fact that their names appear upon the tribal roll prepared in pursuance of the Choctaw acts of September 18 and October 30, 1896.

In my judgment, the action of the commission, under the act of June 10, 1896, not having been appealed from, was final and conclusive against the right of these parties to be admitted to citizenship, and the Choctaw Nation, even if it attempted to do so, had no right thereafter to admit them.

It will be observed that the act of June 10, 1896, provided that application should be made to the commission within three months after the passage of the act, and that the commission should decide all such applications within ninety days after they were made; that the rolls of citizenship of the several tribes as then existing were confirmed, and "any person who shall claim to be entitled to be added to said rolls as a citizen of either of said tribes and whose right thereto has either been denied or not acted upon, or any citizen who may within three months after the passage of this act desire such citizenship, may apply to the legally constituted court or committee designated by the several tribes for such citizenship, and such court or committee shall determine such application within thirty days from the date thereof;" and that "if the tribe or any person be aggrieved with the decision of the tribal authorities or the commission provided for in this act, it or he may appeal from such decision to the United States District Court: *Provided, however,* That the appeal shall be taken within sixty days, and the judgment of the court shall be final."

As I read this act, it authorized application to be made either to the Commission to the Five Civilized Tribes or the "legally constituted court or committee" of such tribes, with a right of appeal by the party aggrieved by the decision of either to the United States court. Therefore, and in view, also, of the

fact that the act contemplated contemporaneous action by the commission and the tribal courts, I think it clear that the provision that "any person who shall claim to be entitled to be added to said rolls [the existing rolls of the tribe] as a citizen of either of said tribes whose right thereto has either been denied or not acted upon," had reference to a previous denial or failure to act of the tribal authorities, and not to the subsequent action or nonaction of the commission, the tense of the verbs "has either been denied or not acted upon," not "shall be denied or not acted upon"—indicating that past action or nonaction was referred to. Prior to the passage of this act the commission had no jurisdiction of these citizenship matters.

When, therefore, as here, the claimant had applied to the commission to be admitted and enrolled, and his application denied, his only remedy, under the act in question, lay in an appeal to the United States court. It is true Thompson claims to have received no notice of the denial of his application by the commission, but that is not a valid excuse.

But aside from this question of jurisdiction in the Choctaw Nation to admit persons to citizenship who had been denied by the commission, it appears that the nation never undertook to authorize the admission or enrollment of these parties, and that, in any aspect of the case, they were enrolled without authority of law, and their names should, in pursuance of the mandate in the act of Congress of June 28, 1898, be eliminated from the tribal rolls.

The Choctaw Nation does not appear to have proceeded under the authority of the act of Congress of June 10, 1896, authorizing the establishment by the

several tribes of a court or committee for the purpose of passing upon applications for citizenship as provided therein. It was not until September 18, 1896, ten days after the expiration of the period in which applications for citizenship were to be submitted to the "legally constituted court or committee" of the tribes under the act of June 10, 1896, that the Choctaw council passed the act above referred to. That act provided for the appointment of census commissioners in each county, with authority "to enroll all *recognized* citizens of the Choctaw Nation by blood, intermarriage, and adoption who are recognized as citizens of the Choctaw Nation under the treaties, constitution, and law of the said nation." It further provided that "the rolls when completed by said commissioners shall be certified to by said commissioners and delivered to the principal chief of the Choctaw Nation on or before the twentieth day of October, 1896, to be revised and approved by the next general council of the Choctaw Nation."

It is manifest that this act conferred no power upon such commissioners to admit any person to citizenship, but only to enroll "recognized citizens." Yet in virtue thereof one of the county committees assumed to pass upon a petition prepared by Thompson's attorney, under date of August 1, 1896, and addressed to the general council of the Choctaw Nation, "at its regular session, October, 1896," praying that "all rights, privileges, and immunities of the Choctaw Nation" be granted to himself, his wife, family, and certain other relatives, "and they be enrolled with the legal citizenship of said nation."

This petition does not appear ever to have been presented to the Choctaw council or referred by any competent authority to the committee which assumed

to pass upon it. Upon its back is the following indorsement:

> William C. Thompson, together with the names appearing on the face of the within application, lineal descendants of Margaret McCoy, are hereby recognized and admitted to the citizenship of the Choctaw Nation or tribe of Indians by the legally constituted Choctaw census commission duly assembled at Kiowa, Ind. T., this the 8th day of October, 1896, upon the testimony of Henry Perkins, Mrs. Lavinia Franklin, they being enrolled Choctaw Indians by blood. The within names, parties not being present, were passed for further enrollment.
>
> A. G. Folsom,
> *Secretary of Census Committee.*

This was a manifest attempt to exercise an authority not delegated to the committee.

On October 30, 1896, the Choctaw council, at its regular session, passed an act creating three commissions, one from each district, one member of each of which to be designated as "chief commissioner," "to make a complete roll of the citizens of the Choctaw Nation." By that act it was made the duty of said commissions "to examine the rolls made by the commissions under the act of September 18, 1896, and also to expunge from said rolls of September 18, 1896, the names of all persons whom they shall adjudge not to be citizens." It was further provided:

> The commission shall enroll as citizens all who come under any of the following heads, and all such persons are hereby declared citizens of the Choctaw Nation:
>
> I. All Choctaws by blood born and raised in the Choctaw Nation.

II. All Choctaws by blood who have been admitted to citizenship by the general council and now residents of the nation.

* * * * *

It was provided that "at the expiration of the time allowed the commissions in each district, the chief commissioners shall meet at Tushka Homma at their earliest convenience, and not latter than the first Monday in December, 1896, and shall revise the rolls made by their respective district commissions during the succeeding ten days after they meet." The chief commissioners were authorized to "enroll the name of any citizen who for any good cause failed to appear before the district commissions." It was further provided that "the roll as completed and signed by the chief commissioners, when approved by the principal chief, shall be the legal and authorized roll of citizens of the Choctaw Nation."

These parties were enrolled by the revisory board, but that their enrollment was unauthorized is clear. The act just referred to only authorized the enrollment of Choctaws by blood who were "born and raised" in the Choctaw Nation or had "been admitted to citizenship by the general council." The applicants possessed neither of these qualifications. According to his own statement, William C. Thompson was not raised in the Choctaw Nation, having been taken to Mississippi shortly after his birth, and returning only once during his boyhood for about a year. It is further stated that he remained in Mississippi until the war, when he went to Texas, not returning again to the Choctaw Nation until 1887. He had never been "admitted to citizenship by the general council." His wife and children could claim no greater rights than he possessed. The other appli-

cants named in his petition were descendants of his brother, who was born in Mississippi and whose record appears to be otherwise about the same as William C. Thompson's.

Moreover, it appears from the opinion of the Assistant Attorney-General for the Interior Department, of March 24, 1905, in the case of Mary Elizabeth Martin, that on July 17, 1897, the principal chief of the Choctaw Nation advised the Commission to the Five Civilized Tribes that he had refused to approve the last revised roll made in accordance with the act of October 30, 1896, because he was satisfied there were some names thereon "that have been registered through fraud or misrepresentation." As such approval was necessary in order to make the roll so prepared "the legal and authorized roll of citizens of the Choctaw Nation," it would seem that in no aspect of the case could these parties be said to be lawfully admitted and enrolled.

It further appears that these applicants, or some of them, including William C. Thompson, applied in 1900 to the Commission to the Five Civilized Tribes for identification as Mississippi Choctaws under the following provision of section 21 of the act of June 28, 1898:

> Said commission shall have authority to determine the identity of Choctaw Indians claiming rights in the Choctaw lands under article fourteen of the treaty between the United States and the Choctaw Nation, concluded September twenty-seventh, eighteen hundred and thirty, and to that end they may administer oaths, examine witnesses, and prepare all other acts necessary thereto and make report to the Secretary of the Interior.

Article 14 of the treaty of September 7, 1830 (7 Stat., 335), provided:

> ART. XIV. Each Choctaw head of a family being desirous to remain and become a citizen of the States shall be permitted to do so by signifying his intention to the agent within six months from the ratification of this treaty, and he or she shall thereupon be entitled to a reservation of one section of six hundred and forty acres of land, to be bounded by sectional lines of survey; in like manner shall be entitled to one-half that quantity for each unmarried child which is living with him over ten years of age, and a quarter section to such child as may be under ten years of age, to adjoin the location of the parent. If they reside upon said lands, intending to become citizens of the States, for five years after the ratification of this treaty, in that case a grant in fee simple shall issue; said reservation shall include the present improvement of the head of the family, or a portion of it. Persons who claim under this article shall not lose the privilege of a Choctaw citizen, but if they ever remove are not to be entitled to any portion of the Choctaw annuity.

The only evidence adduced in any way tending to show a compliance with the terms of this article were statements to the effect that William C. Thompson's grandfather applied for land under the treaty of 1830, but was refused by the Indian agent. Congress, however, by the acts of March 3, 1837, and August 23, 1842 (5 Stat., 180, 513), appointed commissioners for the purpose of adjusting claims of this kind, and there was no evidence to the effect that the ancestors of the claimants had endeavored to comply with the

provisions of those acts, or received patents or certificates for land as therein provided for. The commission properly held, therefore, that it was impossible to identify the applicants as Mississippi Choctaws.

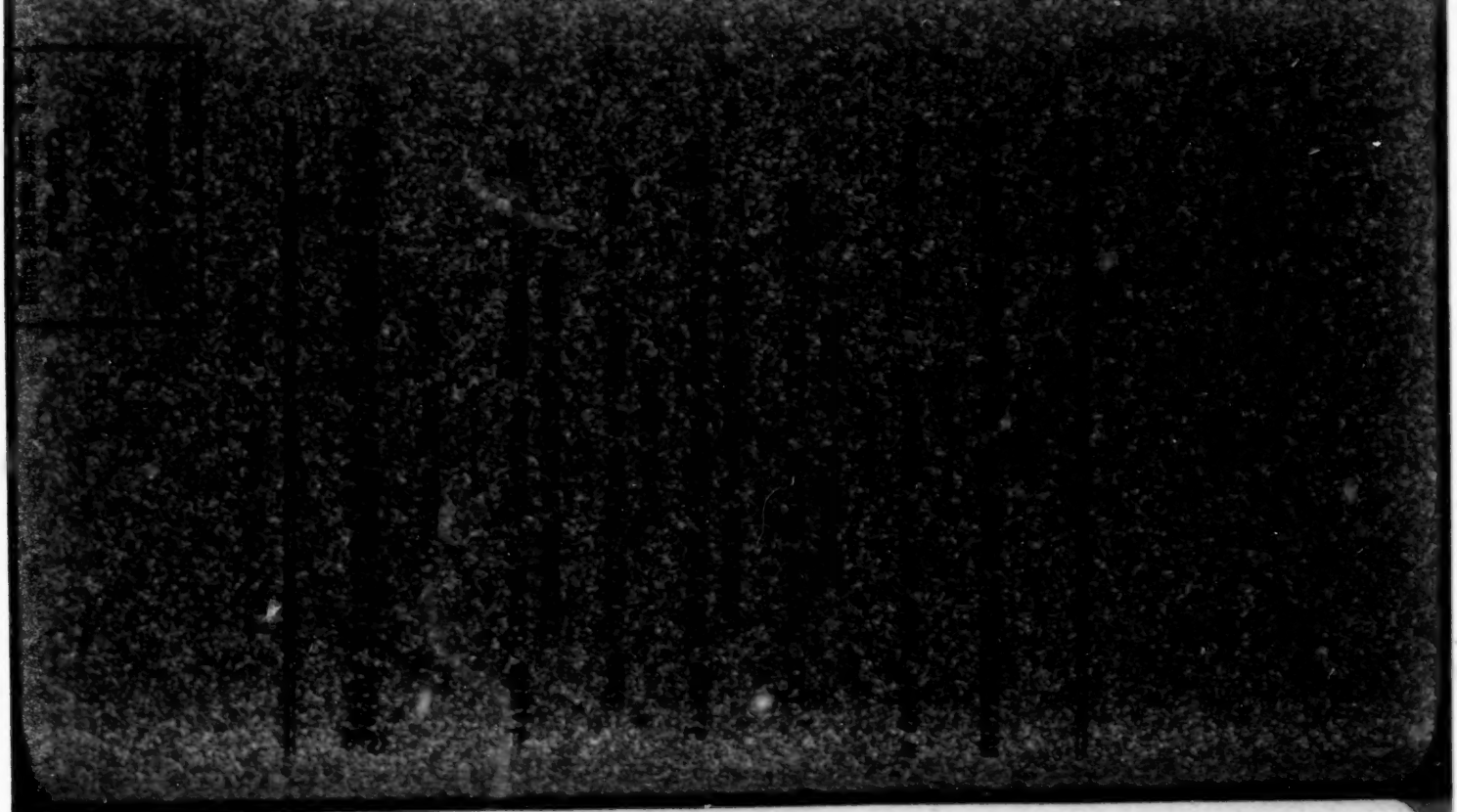
Upon the whole case, it seems to me clear that these applicants, and those claiming intermarried rights with them, should be denied enrollment.

This disposes of the several cases submitted. The papers therein are herewith returned.

Respectfully,

CHARLES J. BONAPARTE.

The SECRETARY OF THE INTERIOR.



# In the Supreme Court of the United States.

OCTOBER TERM, 1908.

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JAMES RUDOLPH GARFIELD, SECRETARY of the Interior, plaintiff in error,
*v.*
THE UNITED STATES OF AMERICA EX REL. Ida Allison. } No. 249.

JAMES RUDOLPH GARFIELD, SECRETARY of the Interior, plaintiff in error,
*v.*
THE UNITED STATES OF AMERICA EX REL. George A. Allison. } No. 250.

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## SUPPLEMENTAL BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

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### I. The Facts.

In these two cases the material facts are set forth on pages 13, 15, and 16 of each record. In the answer to the petition of Ida Allison it is set forth:

> Respondent further says that petitioner applied in 1896 to the Commissioner to the Five Civilized Tribes to be admitted and

enrolled as a citizen of the Cherokee Nation under the act of June 10, 1896 (29 Stat., 329), and her application was denied; that no appeal was taken by her from such judgment to the United States Court for the Indian Territory, as provided in that act, whereby such judgment became final, and that thereafter the Commissioner to the Five Civilized Tribes and Secretary of the Interior had no jurisdiction or authority to enroll petitioner.

The circumstances as to these petitioners and their mother are contained in a letter from Commissioner Tams Bixby to the Secretary of the Interior, of which a copy is filed as Exhibit B with the answer.

**II. The Law.**

The law affecting the case is set forth in paragraph 6 of the petition, on pages 3 and 4 of the record; and it thereby clearly appears that, under the provisions of the act of June 10, 1896, the rolls as prepared by the commission, and corrected in case of appeal by the District Court, were to be regarded as "the final judgment of the constituted authorities."

Nothing in the subsequent legislation relating to this subject will be found to have repealed expressly or by implication this provision. Such being the case, it seems clear that, if it was a void act on the part of the Secretary of the Interior to correct the entry he had previously approved by reason of the terms of section 29 of the act of

July 1, 1902, given on page 5 of the record, it was no less beyond the power of the Commission to the Five Civilized Tribes to entertain again, after eight years had elapsed, the application for enrollment of these petitioners which it had rejected when first presented; and these appellees are in the position of claiming that the cancellation of the entries in their cases was unauthorized by law and void when, for precisely the same reasons, it would follow that the original entry on which they rely was itself unauthorized and void.

**III. Administrative Construction.**

Leaving to the ability of their counsel the task of extricating them from this dilemma, we respectfully submit that, according to the proper construction of these various statutes, including section 29 of the act of 1902, above quoted, all proceedings relating to the enrollment of the citizens of the several tribes, except in the cases of those alleged Choctaws or Chickasaws affected by the provisions relating to the citizenship court, were *in fieri* until all the rolls as to the tribe concerned had been completed and the number and identity of the persons entitled to share in the lands and property of that tribe had been definitely ascertained.

This was the administrative construction given to the act by the Secretary of the Interior, as is shown by the facts stated on page 12 of these records and page 26 of the Goldsby record. Several

hundred names are shown to have been stricken from the rolls by the Secretary at different times prior to the action taken in this case, and this practice had been continuous and notorious during the entire time while the administration of these several statutes was in progress.

**IV. Legislative and Judicial Approval of this Construction.**

Moreover, in the case of the Cherokees at least, there had been an implied denial of the irrevocability of the Secretary's approval of the partial rolls asserted by the petitioners in this case, both by Congress and by this court in the case of the Intermarried Whites, many of whom had been thus enrolled.

The Secretary of the Interior referred the question of their right to remain on the rolls to the Court of Claims under the provisions of the Bowman Act, and afterwards, by the act of March 3, 1905 (33 Stat., 1048, 1071), Congress authorized the Court of Claims to render final judgment in that case, and allowed an appeal from its decision to this court with a provision for the advancement of such appeal on the calendar. As a result of the decision of the Court of Claims (40 C. Cl., 411), affirmed by this court (203 U. S., 76), the names of several hundred such alleged intermarried citizens were stricken from partial rolls already approved by the Secretary of the Interior, and so little weight seems to have been attached to the

legal effect of his approval by the learned counsel who represented them in both courts that the question of its finality does not appear to have been raised in either.

**V. This Construction Justified by Necessity.**

In fact, a consideration of the circumstances of the case will show that there was an urgent necessity for the adoption of this construction. By reference to the government's brief in the *Allison cases* (p. 6) it will be seen that the so-called "dead line" among the Cherokees was fixed at September 1, 1902. As is further stated in the statute (32 Stat., Pt 1, p. 721), "The right of such person to any interest in the lands or other tribal property shall be deemed to have become extinguished and to have passed to the tribe in general upon his death before such date." As a matter of fact, the names of some persons had been already entered on approved partial rolls prior to that date, who died before the day thus fixed had arrived, and the cancellation of their names was obviously required by the express terms of the law, nor is it easy to see how, in their case, there could have been any notice or opportunity for hearing.

Moreover, it is a notorious fact, of which the court may be asked to take judicial notice, that among the Indians of these several tribes there were and are still a number known as "Snakes," "Pullbacks," and by other colloquial designations, who have refused and still refuse to

accept allotments of land or recognize in any form of acquiescence the right of the United States to distribute their lands or break up their tribal organizations.

It has been necessary for the Commission to the Five Civilized Tribes to enroll these Indians and many others, who, from mere ignorance, stupidity, and timidity, could not be induced to apply personally, according to the best information it could obtain as to their respective names, habitations, and rights to allotment, and allotments have been made to them *in invitum*, which in a large number of cases they have refused to receive. Under such circumstances mistakes were unavoidable, the same recalcitrants being sometimes entered more than once under different names or in different neighborhoods, and some persons who died before September 1, 1902, being erroneously placed on the lists. As these mistakes have been discovered they have been corrected by the Secretary of the Interior, and, here again, it would seem difficult to give notice to a person who did not exist or who was hiding in the wilderness hoping to avoid compulsory enrollment.

### VI. Conclusion.

It is, therefore, respectfully submitted that the construction placed by administrative practice upon section 29 of the act of 1902 is not only entitled to the respect always shown to such construction when it has been long continued and

consistent, but it has received an implied sanction from Congress and was in itself reasonable and, indeed, almost indispensable to the satisfactory administration of these laws.

**VII. It is apparent that it was not the intention of Congress that, when an application for citizenship was once denied, it should be at any time thereafter reopened.**

As above stated, under the act of 1896, the rejection of an application was meant to be a final determination of the matter, and there is nothing in either of the subsequent acts to justify the contention that it was intended that a case already decided against an applicant might be reopened or another application made by such person. In each of the successive acts the provisions regarding enrollment were enacted for the benefit of the tribes and against the individual claimants. As evidence of this, in the act of 1896, it was provided that "The rolls of citizenship of the several tribes as now existing are hereby confirmed."

In the act of 1897 it was provided that "The words 'rolls of citizenship' as used in the act of June 10, 1896, * * * shall be construed to mean the last authenticated rolls of each tribe which have been approved by the council of the nation, and the descendants of those appearing on such rolls, and such additional names and their descendants as have been subsequently added, either by the council of such nation, the duly authorized courts thereof, or the commission under the act of

June 10, 1896." And in the act of 1898, section 21 (30 Stat., 502), it was provided that "In making rolls of citizenship * * * the Commission to the Five Civilized Tribes is authorized and directed to take the rolls of Cherokee citizens of 1880 (not including freedmen) as the only roll intended to be confirmed by this act and preceding acts of Congress, and to enroll all persons now living whose names are found on said rolls and all descendants born since the date of said rolls to persons whose names are found thereon."

It appears, therefore, that each successive act broadened the jurisdiction of the commission with reference to the tribal rolls, and authorized them to inquire into the validity of the citizenship of parties, into which they could not inquire under prior acts; *but there was not an intimation that the commission could reopen the claim of an individual upon which they had previously given an adverse decision.* It was the same commission throughout, and possessed the same powers and methods of making inquiry, except the number of parties to whom their jurisdiction extended was, from time to time, increased.

We insist, therefore, that when the commission passed final judgment rejecting a claim for citizenship the matter passed beyond their jurisdiction. Each claim constituted but one suit, and additional applications subsequently made could not be regarded as different suits; consequently,

when an application was made and rejected, that case was finally disposed of, and the commission had no more power to reopen or hear another application from the same individual than a court has the power, after final decree has been entered and the record signed and court adjourned, to reopen a case and reverse its judgment.

**VIII. Difference between Law as to Cherokees and Law as to Choctaws and Chickasaws.**

*We also and especially call the court's attention to the fact that the power of the Secretary with reference to the citizenship rolls of the Cherokee tribe was quite different from his power with reference to the Choctaw and Chickasaw tribes.*

This clearly appears from a review of the statutes.

Under the act of 1896 (29 Stat., 339) no power of approval was given to the Secretary of the Interior of the action of the commission, and if an appeal was taken from their action to the District Court, the judgment of that court was conclusive. Nor was the Secretary of the Interior vested with the power of approval by the act of 1897. (30 Stat., 84.) This act purported to interpret the act of 1896 in such a way as to extend the jurisdiction of the commission, and enable them to inquire into the legality of the enrollment of various parties whose names appeared on the tribal rolls.

The first act conferring such power upon the Secretary of the Interior was that of 1898 (30 Stat., 503), wherein it was provided that—

> The rolls so made, *when approved by the Secretary of the Interior*, shall be final, and persons whose names are found thereon, with their descendants, thereafter born to them, with such persons as may intermarry according to tribal laws, shall alone constitute the several tribes which they represent.

In the use of the plural "rolls" Congress had reference to the rolls of the several tribes, and not partial lists or rolls. In fact, there was no provision in this statute for the sending in of partial lists.

The act of 1900 (31 Stat., 236) provided that the commission should continue to exercise all authority theretofore conferred on it by law, but prohibited the commission from considering the application of any person for enrollment as a member of any tribe in the Indian Territory who had not been a recognized citizen thereof and duly and lawfully enrolled and admitted as such, and provided that its refusal of such application should be final *when approved by the Secretary of the Interior*.

In the act of 1901 (31 Stat., 1077) it was provided that—

> The rolls made by the Commission to the Five Civilized Tribes, *when approved by the Secretary of the Interior*, shall be final, and persons whose names are found thereon

> shall alone constitute the several tribes which they represent, and the Secretary of the Interior is authorized and directed to fix a time by agreement with said tribes or either of them for closing said rolls. Upon failure of said tribes or any of them to agree thereto, then the Secretary of the Interior shall fix a time for closing said rolls, after which no names shall be added thereto.

In this act there was no provision made for the sending in of partial lists or rolls, and consequently the action of the Secretary of the Interior under this act in approving the names or lists of names *did not become final until the entire completed roll was approved by him*. In fact, partial lists were not sent in under this act.

It was in the agreement and act of July 1, 1902, section 30, page 646, where the first provision was made for the sending in of partial lists, the language of said section being as follows:

> For the purpose of expediting the enrollment of the Choctaw and Chickasaw citizens and Choctaw and Chickasaw freedmen, the said commission shall, from time to time, and as early as practicable, forward to the Secretary of the Interior lists upon which shall be placed the names of those persons found by the commission to be entitled to enrollment. The lists thus prepared, *when approved by the Secretary of the Interior*, shall constitute a part and parcel of the final rolls of the citizens of the Choctaw and Chickasaw

> tribes and of Choctaw and Chickasaw freedmen, upon which allotment of land and distribution of other tribal property shall be made as herein provided. Lists shall be made up and forwarded when contests of whatever character shall have been determined; and when there shall have been submitted to and approved by the Secretary of the Interior lists embracing names of all those lawfully entitled to enrollment the rolls shall be deemed complete.

This act was a confirmation of an agreement between the United States and the Choctaw and Chickasaw tribes, *and had no relation whatever to the Cherokee tribe. That tribe was not a party to the agreement, and in no section of the act is its name mentioned. Moreover the language of the section shows that it was limited to the Choctaw and Chickasaw tribes.*

Under the act of 1906 (34 Stat., 137), it was provided that the rolls should be closed the 4th day of March, 1907.

*We therefore earnestly insist that when the Secretary of the Interior struck the name of the Allisons from the roll their enrollment had not passed beyond his jurisdiction, inasmuch as he had not up to that time approved the entire roll of the Cherokee tribe.*

**IX. If Action Substantially Right, no Remedy by Mandamus.**

In response to the insistence of counsel that a notice to the Allisons of the purpose of the Secretary of the Interior to strike their names from the roll was necessary in order to give validity to his action, we insist that even if such action on the part of the Secretary may, for the sake of argument, be conceded to have been irregular, yet as it appears from the record that the Allisons had once been rejected, and that their names ought never to have been placed upon the roll, the writ of mandamus should be denied.

In support of this proposition we call the court's attention to the authorities cited in section 4, subsection 5, of the supplemental brief filed by appellant in the case of *James Rudolph Garfield, Secretary of the Interior*, v. *United States of America, ex rel. John E. Goldsby*, No. 248, October term, 1908.

Respectfully submitted.

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*Attorney-General.*

JAMES A. FOWLER,
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# Supreme Court of the United States.

OCTOBER TERM, 1908.

JAMES RUDOLPH GARFIELD, SECRETARY OF THE INTERIOR, Plaintiff in Error
*vs.*
THE UNITED STATES OF AMERICA, EX REL. JOHN E. GOLDSBY, Defendant in Error. — No. 248.

JAMES RUDOLPH GARFIELD, SECRETARY OF THE INTERIOR, Plaintiff in Error
*vs.*
THE UNITED STATES OF AMERICA, EX REL. IDA ALLISON, Defendant in Error. — No. 249.

JAMES RUDOLPH GARFIELD, SECRETARY OF THE INTERIOR, Plaintiff in Error
*vs.*
THE UNITED STATES OF AMERICA, EX REL. GEORGE A. ALLISON, Defendant in Error. — No. 250.

## Brief on Behalf of Defendants in Error.

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# Supreme Court of the United States.

OCTOBER TERM, 1908.

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| JAMES RUDOLPH GARFIELD, Secretary of the Interior, *Plaintiff in Error,* *vs.* THE UNITED STATES OF AMERICA, Ex Rel. JOHN E. GOLDSBY, *Defendant in Error.* | No. 248. |
| JAMES RUDOLPH GARFIELD, Secretary of the Interior, *Plaintiff in Error,* *vs.* THE UNITED STATES OF AMERICA, Ex Rel. IDA ALLISON, *Defendant in Error.* | No. 249. |
| JAMES RUDOLPH GARFIELD, Secretary of the Interior, *Plaintiff in Error,* *vs.* THE UNITED STATES OF AMERICA, Ex Rel. GEORGE A. ALLISON, *Defendant in Error.* | No. 250. |

## BRIEF ON BEHALF OF DEFENDANTS IN ERROR.

These cases come to the Supreme Court on writs of error sued out by the plaintiff in error, James Rudolph Garfield, at present and at the time of the original filing of these suits Secretary of the Interior, from findings by

the Court of Appeals of the District of Columbia affirming orders made by the Supreme Court of the District of Columbia directing that writs of mandamus issue commanding the plaintiff in error to restore to the rolls of citizenship in the Chickasaw Nation, in the then Indian Territory, the petitioner, Goldsby, and in the Cherokee Nation the petitioners, Allison, the Secretary of the Interior, Ethan A. Hitchcock, or his assistant secretaries with authority from him, having placed the names of these persons on the final rolls of citizenship in the respective nations, and then, many months later, on March 4, 1907, having stricken their names from said rolls without notice to the defendants in error, petitioners below (Goldsby and Allison, Recs., pp. 8 and 9), and deprived them by a blanket order of the property rights and privileges appertaining to membership in the Five Civilized Tribes (Rec., pp. 9, 19 to 21). The orders of mandamus directed (p. 31) restoration of the names of petitioners to the tribal rolls, erasure of statements thereon derogatory to their rights as tribal members, and recognition of the several petitioners as enrolled tribal members. The ground on which the court of first instance ordered writs of mandamus to issue was that plaintiff in error had no authority to strike names from the rolls without a hearing, even conceding he had authority at all to strike names from the rolls, as to which no opinion was expressed (Rec., p. 30). The Court of Appeals, in affirming the order entered, found that destruction of the rights consequent on enrolment was so opposed to the genius of our institutions that it ought not to be inferred to exist and that the statutes conferred no such authority on the Secretary of the Interior. From the Court of Appeals the cases come here, where they have been consolidated, as was done in the Court of Appeals.

These cases involve the question, first, as to the authority of the Secretary of the Interior to strike names from the tribal rolls and deprive the enrolled parties of property rights in tribal lands and funds after approval of their enrolment by the Secretary and allotment of lands in severalty to the parties, to some of whom allotment certificates were issued and patents to others; and, second, if such authority existed, whether the same could be exercised without notice and opportunity to defend given the parties whose elimination from the rolls was proposed. It may be stated that while no notice was given any of the present defendants in error, there are several hundred other persons who were stricken from the rolls with more or less opportunity of defense, so that the first and broader proposition is brought primarily to the Court's attention. The Goldsby and Allison cases are believed to be in legal principle alike, although several appeals have been taken by plaintiff in error, so that the Court may, if it sees reason therefor, distinguish between cases in the Choctaw and Chickasaw Nations from cases in the Cherokee Nation, or between the cases of parties who, after their enrolment by the Secretary, had obtained patents to their lands prior to the cancelation of their enrolment, and parties to whom allotment certificates, but not patents, had been issued.

## Statement of the Goldsby Case.

John E. Goldsby, by his petition for mandamus, averred that he was a Chickasaw Indian by blood and had been long recognized as such by the Choctaw and Chickasaw Nations. That by the treaties and agreements between those nations and the United States the

latter in exchange for tribal lands east of the Mississippi River had conveyed to the Choctaw and Chickasaw Nations the land whereon the two nations lived in the Indian Territory "in fee simple to them and their descendants, to inure to them while they shall exist as a nation and live on it," the lands being by the United States "forever secured and guaranteed to the members of the Choctaw and Chickasaw Tribes, their heirs and successors, to be held in common, so that each and every member of either tribe shall have an equal undivided interest in the whole: Provided, however, That no part thereof shall ever be sold without the consent of both tribes, and that said lands shall revert to the United States if said Indians and their heirs become extinct or abandon the same." That the conditions just named had not happened and that the reversionary interest of the United States had been terminated and surrendered by what are known as the Dawes Commission agreements and statutes. That the petitioner was one of the heirs of the Indians referred to, and as such entitled to an equal undivided interest in tribal lands and funds. That the duty of approving the enrolment of persons and placing them on the final rolls of members of the Choctaw and Chickasaw Nations had been devolved by law on the Secretary of the Interior. That on March 27, 1906 (Rec., p. 7) said Secretary, or rather his duly authorized first assistant, had duly and regularly approved a final roll of citizens by blood containing the name of Goldsby in accordance with a decision rendered October 6, 1905, by the Secretary affirming a finding by the Commission to the Five Civilized Tribes (popularly known as the Dawes Commission), made after a full and careful inquiry and without any concealment or

fraud, that Goldsby was entitled to enrolment. That Goldsby's name had been placed on the final approved roll "under rules, regulations, custom and practice, whereby notice was given of all steps affecting rights of parties with opportunity afforded for appeals and motions for rehearing and review by petitioner or the Choctaw and Chickasaw Nations." That Goldsby, after having been duly and regularly placed on the final approved rolls, duly and regularly selected an allotment of 320 acres of land and an allotment certificate therefor was duly and regularly issued to him by the Commission to the Five Civilized Tribes, and was held by him as "conclusive evidence" of his right to the land described therein. That he was the owner of and possessed in lawful right of the allotment described, and further, was entitled to an equal undivided distributive share in the funds and surplus tribal lands after all other duly enrolled tribal members secured their personal allotments.

That subsequently, on March 4, 1907, Ethan A. Hitchcock, as Secretary of the Interior, arbitrarily, illegally and without notice of any kind (Rec., p. 8) to Goldsby, issued an order (pp. 20 and 21) under which Goldsby's name, on March 4, 1907, was stricken or attempted to be stricken from one of the five copies made of each final roll of Chickasaw citizens, and after March 4, 1907, his name was stricken from the remaining final approved rolls, and also on all five rolls required by law to be kept there was written: "Canceled March 4, 1907." That this action was taken on the supposed theory that petitioner's citizenship rights came within an opinion rendered in February, 1907, by the Attorney-General in another case (the Myrtle Randolph-William Thompson case) to which Goldsby was not a party and in which he

had no hearing or right to be heard. That on learning what had been done Goldsby made demand on plaintiff in error, who meanwhile had succeeded Mr. Hitchcock as Secretary of the Interior, that he erase from the rolls the cancelation of his name as an enrolled tribal member and restore him to the rolls, but plaintiff in error refused to restore him to the rolls or to recognize him as a tribal member and entitled to tribal funds or a share of the lands, the result being to deprive him of his vested right to a share in tribal lands and funds without due process of law. The prayer of Goldsby's petition was that plaintiff in error by writ of mandamus be commanded to erase the notations on the approved rolls in derogation of Goldsby's claims as a duly and lawfully enrolled blood member of the Chickasaw Nation, to restore him to full and lawful enrolment, and to recognize him as a blood member of the nation with all the rights and privileges thereunto appertaining.

The answer admitted the facts alleged, but denied certain conclusions set up in the petition. It denied that Goldsby acquired a vested right to any specific allotment; that he was duly enrolled and entitled to a distributive share of tribal funds and surplus lands; averred that prior to the date fixed by Congress for completion of the tribal rolls the Secretary, while having placed his name upon a partial approved list of members of the Chickasaw Nation, had disapproved the enrolment of Goldsby and stricken his name from the rolls; that the Secretary had not approved the allotment of lands for which a certificate of allotment had been issued by the Dawes Commission and no patent therefor had been issued. That Goldsby's name had been lined out and a notation

of the order of the Secretary striking off his name from the rolls had been made on the copy of the approved rolls in the Secretary's possession prior to the date fixed for completion of the rolls and on the other four copies subsequently. That between July 1, 1902, and March 4, 1907, the predecessor of plaintiff in error had struck off several hundred names because in his judgment improperly enrolled. That there was no rule or regulation requiring the giving of notice before striking off names. That at first names were stricken off without notice, but that while for about three years before March 4, 1907, the date fixed by Congress for completion of the rolls, it had been the custom or practice to give notice and afford the interested party an opportunity to be heard, it was impossible owing to the date fixed for closing the rolls to give notice and a hearing to Goldsby and a large number of other persons whose right to be enrolled was believed to be adversely affected by the opinion of the Attorney General of February 19, 1907, in the case of certain other persons who had been enrolled and, under that opinion, stricken off. The ground of the action taken was stated to be that Goldsby in 1896 had applied for enrolment and his application had been allowed by the Dawes Commission; that on appeal by the Chickasaw Nation to the United States District Court this finding of the Dawes Commission had been approved; that this court judgment in a test suit instituted under the act of July 1, 1902, had been annulled by the Choctaw-Chickasaw Citizenship Court,; that Goldsby failed to remove his case to the Citizenship Court for final determination, and that by reason thereof the Secretary of the Interior had no jurisdiction to enroll him. The answer asserted that the

matters sought to be controlled involved the exercise of judgment and discretion and were committed to the exclusive jurisdiction of the Secretary of the Interior.

Both petition and answer set forth in extenso for the guidance of the court the statutes in relation to enrolments and allotments.

Goldsby, through his counsel, demurred to the answer, the ground stated (p. 30) being that it set forth "no sufficient reason in law for the cancelation by the Secretary of the Interior without notice of the enrolment of petitioner duly and regularly ordered." The trial court sustained the demurrer on the stated ground, and plaintiff in error, electing to stand upon his answer, the writ of mandamus was ordered to issue.

## Statement of the Allison Cases.

The cases of the Allisons differ only in minor details from that of Goldsby, which was the first case filed. The Allisons claim as Cherokees by blood. The Secretary's final approval of the enrolment of Ida Allison occurred July 2, 1904 (p. 6). A certificate of allotment, but no patent, had been issued to Ida Allison. Patent to the land allotted him had been issued to George Allison and recorded (p. 14). The ground stated for striking the Allisons from the final rolls was that they had applied to the Dawes Commission in 1896 for enrolment and had been denied, and that no appeal having been taken therefrom to the United States Court, the Secretary thereafter had no jurisdiction or authority to enrol them (p. 13). The Allisons are children of Margaret Allison, and were admitted to Cherokee citizenship by an act of the Cherokee National Council approved December 8, 1894.

They are one-sixteenth Cherokee blood. The title of the Cherokee Nation to its lands is substantially the same as the Choctaws and Chickasaws, and for present purposes the laws relating to enrolments and allotments are the same.

## Statement of Laws Applicable.

The final enrolment of members of the Five Civilized Tribes and division in severalty of the vast tribal estates held in common was initiated by act of Congress approved March 3, 1893 (27 Stats., 645; Kappler, Vol. I, 498). This act created the Dawes Commission and directed it to negotiate with the Five Civilized Tribes with a view to—

> "the ultimate creation of a State or States of the Union, which shall embrace the lands within said Indian Territory."

The act recognized the Indians' title to the lands, but directed the Commission to secure extinguishment of "the national or tribal title" by allotment and equal division in severalty of the land among the tribal members, or the United States, if necessary, would buy the lands and distribute the proceeds. For years prior thereto the Five Civilized Tribes had occupied most of the large area known as the Indian Territory under an early national policy that sought to relieve the pressure of white settlers for lands and of the Indians from white civilization by concentrating large bodies of Indians in one region.

The act authorized the Dawes Commission to hear and determine the applications for citizenship of all persons

who might apply to it within three months from its passage, the Commission to "decide all such applications within ninety days after the same shall be made." Due force and effect was to be given to tribal rolls, usages, customs, and laws if not inconsistent with Federal laws, and it provided "that the rolls of citizenship of the several tribes as now existing are hereby confirmed," and persons claiming to be entitled to be added to such rolls "and whose right thereto has either been denied or not acted upon," or any citizen desiring such citizenship, were given the right to have their claims determined within four months by tribal citizenship courts or committees. If any tribe or person was aggrieved with the decision of either tribal authorities or the Dawes Commission an appeal might be taken to the United States District Court, whose judgment was final. After six months the Commission was to make a complete roll of citizenship of each nation from the several sources named, the lists as finally approved by them to be filed with the Commissioner of Indian Affairs "for use as the final judgment of the duly constituted authorities."

The Dawes Commission, as is matter of official history, did not adopt the tribal rolls as confirmed, but proceeded to try the right of persons to be on the tribal rolls, and the controversy which ensued continued, and the rolls were not closed until March 4, 1907, Congress refusing to heed administrative appeals for more time.

By act of June 7, 1897 (30 Stats., 62—Kappler, Vol. I, 88), legislation limiting the confirmation of tribal rolls contained in the act of 1896 was passed. It was enacted that the rolls confirmed meant—

> "the last authenticated rolls of each tribe which have been approved by the Council of the Nation and the descendants of those appearing on such rolls, with such additional names as have been added either by the Council of the Nation, its courts, or the Dawes Commission under the act of June 10, 1896."

The Dawes Commission was given the right to investigate all other names, and after ten days' notice and opportunity to be heard, to strike names from the tribal rolls, with right of appeal to the United States courts.

Later, by act of June 28, 1898, known as the "Curtis Act" (30 Stats., 495—Kappler, Vol. I, 90), Congress took up the entire subject of affairs in the Indian Territory and passed a broad comprehensive measure. It reduced the confirmed rolls to the Cherokee roll of 1880 (and later the Dunn Creek roll). The Commission was "directed to make correct rolls of the citizens by blood of all the other tribes, eliminating from the tribal rolls such names as may have been placed thereon by fraud or without authority of law, enrolling such only as may have lawful right thereto. * * * The rolls so made, when approved by the Secretary of the Interior, shall be final," and the persons whose names are found thereon, with their descendants and persons intermarrying, according to tribal laws, "shall alone constitute the several tribes which they represent."

By act of May 31, 1900 (31 Stats, 170—Kappler, Vol. I, 105), the Dawes Commission, it was declared, "shall continue to exercise all authority heretofore conferred on it by law. But it shall not receive, consider, or make any record of any application of any person for enrolment as a member of any tribe in Indian Territory who has not

been a recognized citizen thereof, and duly and lawfully enrolled or admitted as such, and its refusal of such applications shall be final when approved by the Secretary of the Interior."

The act of March 3, 1901 (31 Stats., 1058—Kappler, Vol. I, 112), provided that "The rolls made by the Commission to the Five Civilized Tribes, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon shall alone constitute the several tribes which they represent." The Secretary of the Interior was directed by agreement with the tribes to fix a time for closing the rolls, and on default of agreement was to fix such time himself, "after which no name shall be added thereto."

In 1902 agreements were effected and approved between the Choctaw and Chickasaw and the Cherokee tribes and the United States. Aside from an earlier Creek agreement, these agreements constitute the first statutes specifically providing for the breaking up of the communal land tenure system and allotment in severalty of the tribal lands among the national or tribal members. Assent of the tribes was procured to these agreements, which Congress approved and the President proclaimed. The Choctaw-Chickasaw agreement of July 1, 1902 (32 Stats., 641—Kappler, Vol. I, 776), in its principal section, so far as is important to the present suit, provided:

> "30. For the purpose of expediting the enrolment of the Choctaw and Chickasaw citizens and Choctaw and Chickasaw freedmen, the said Commission shall, from time to time, and as early as practicable, forward to the Secretary of the Interior lists upon which shall be placed the names

> of those persons found by the Commission to be entitled to enrolment. The lists thus prepared, when approved by the Secretary of the Interior, shall constitute a part and parcel of the final rolls of citizens of the Choctaw and Chickasaw tribes and of Choctaw and Chickasaw freedmen, upon which allotment of land and distribution of other tribal property shall be made as herein provided. Lists shall be made up and forwarded when contests of whatever character shall have been determined, and when there shall have been submitted to and approved by the Secretary of the Interior lists embracing names of all those lawfully entitled to enrolment, the rolls shall be deemed complete. The rolls so prepared shall be made in quintuplicate, one to be deposited with the Secretary of the Interior, one with the Commissioner of Indian Affairs, one with the principal chief of the Choctaw Nation, one with the governor of the Chickasaw Nation, and one to remain with the Commission to the Five Civilized Tribes."

Section 11 of this act provided that "there shall be allotted to each member of the Choctaw and Chickasaw tribes, as soon as practicable after the approval by the Secretary of the Interior of his enrolment as herein provided, land equal in value to 320 acres of the average allottable land of the Choctaw and Chickasaw Nations," and the immediately following sections contained other provisions as to allotment to tribal members.

Section 31 of the act provided that complaint having been made by the Choctaw and Chickasaw Nations that the United States District Court, under the act of June 10, 1896, had tried citizenship appeals upon notice to only one instead of both nations, and had tried citizenship cases *de novo* instead of on the records before the Dawes Com-

mission, ten test suits should be made up and these questions determined by a court created by the act, to be known as the Choctaw and Chickasaw Citizenship Court. If the Indian Nations' contentions should be sustained, then this new court was to continue in existence, and was given jurisdiction to pass on citizenship cases decided by the United States District Courts under the act of 1896. Either of the nations, if aggrieved, or any aggrieved applicant for citizenship by any district court decision under the act of 1896, was given the right of transfer of the case to the Choctaw-Chickasaw Citizenship Court, which was directed to go to the very right of the controversy, and its decision was declared final.

The Myrtle Randolph-William Thompson cases were among those transferred, and the Citizenship Court decided adversely to them. The cases of none of the present defendants in error were before this Citizenship Court.

After several statutory directions to close the rolls, Congress fixed March 4, 1907, as the date after which no names should be added to the rolls, and resisted administrative requests for still more time.

## Argument.

Counsel for defendants in error contend that as the facts with reference to original enrolment and allotment alleged in the petition are admitted by the answer and denial made only of the effect claimed for the facts and the conclusions drawn from the facts, the demurrer, admitting only the facts well pleaded and not legal conclusions, raises for determination only points of law and the correct construction and interpretation of the law. The legal propositions are:

1. Had the Secretary of the Interior, after duly approving the final rolls containing the names of applicants, jurisdiction and authority to cancel their enrolment?

2. If so, could he cancel the enrolments without notice?

3. Assuming he had such power, without notice, will the courts look into the question of the correctness of the acts of cancelation, and if so, was the Secretary correct on the merits in holding defendants in error not lawfully on the rolls and directing cancelation of their names?

None of these propositions, we submit, necessarily includes the other.

4. Is mandamus the proper remedy?

5. Has the court jurisdiction to grant relief?

**The Secretary of the Interior Neither by Express Grant Nor Necessary Implication Was Given Authority to Strike Names From Final Approved Rolls. His Jurisdiction Ceased With Approval of Final Rolls.**

The jurisdiction of the Secretary of the Interior with reference to the rolls of the Five Civilized Tribes is derived entirely from the statute law with reference to those tribes, such statutes to large degree being the result of solemn agreements in the nature of treaties between the several tribes and the United States. Repeated opinions of this court have established that executive officers of the Government have such authority and jurisdiction, and only such authority and jurisdiction, as the statutes give them either expressly or by necessary implication and as incidental to the express powers con-

ferred. If this be true of statutes in general, the rule should have a strict application in the pending cases where the statutes really are conventions between the United States as *parens patriae* of the Indians and the Indian nations for the partition in kind and money of the vast tribal estates among the tribal members.

Under the statutes relating to enrolments and allotments in the Five Civilized Tribes Congress conferred on the Secretary of the Interior jurisdiction, with the aid of the Commission to the Five Civilized Tribes, otherwise known as the Dawes Commission, to enrol persons claiming citizenship in any of the Five Civilized Tribes and to allot to those enrolled their equal share in the lands and funds of the tribes. Receipt of an equal share of tribal lands and funds followed inevitably and inseparably and as a necessary consequence of enrolment, for to have held a person entitled to enrolment as of Indian blood and to be a descendant of the Indians who took the lands in the Indian Territory in exchange for lands east of the Mississippi, and yet not entitled to an allotment, would have been in violation of treaties and of the terms of the patents under which the Indian Nations held the lands (Rec., p. 2).

The primary purpose of Congress in undertaking the work of enrolment and allotment was expressed in the act of March 3, 1893 (27 Stats., 645—Kappler, Vol. I, 498), creating the Dawes Commission to be "the extinguishment of the national or tribal title" * * * "to enable the ultimate creation of a State or States of the Union which shall embrace the lands within said Indian Territory." In other words, as a matter of national policy Congress was determined on the abolition of the communal tenure of land in the Indian Territory (which

Territory, equally as a matter of national policy, earlier had been created as a home for Indians generally in pursuance of a centralization policy that by 1890 had outlived its usefulness), the division of the soil among the Indians, and the adoption of such measures as would fit both the country and the people for American statehood. The necessity for the United States undertaking the work of enrolment was thus stated in the report of the Dawes Commission of November 18, 1895:

> "The Commission is of opinion that if citizenship is left, without control or supervision, to the absolute determination of the tribal authorities, with power to decitizenize at will, the greatest injustice will be perpetrated and many good and law-abiding citizens reduced to beggary."

We have stated the foregoing at the outset because we believe a statement of the primary purpose of and necessity for Congressional action of value in consideration of the statutes, and because we believe the national policy enunciated of settlement, improvement and upbuilding of the country inconsistent with the claim of the plaintiff in error of an implied power to undo and to disturb rights of property at will.

In the initial legislation providing for enrolments embodied in the act of 1896, provision was made for trial of rights only of persons not on tribal rolls, but who claimed right to citizenship notwithstanding, the tribal rolls being by the act confirmed in express terms. This confirmation of tribal rolls was fought by the Indian Nations on the ground that injustice to the nations would result if inquiry into tribal rolls was barred, inasmuch as persons were to be found thereon never entitled and

whose place thereon was a fraud. Gradually by successive statutes the Indian Nations lessened the extent of confirmation of tribal rolls, and in response to their allegations against the verity of their own rolls comprehensive legislation was obtained (Curtis act of June 28, 1898). By this act direction was given the Dawes Commission to investigate all rolls save two designated and confirmed rolls, and "to make correct rolls of citizens by blood of all the tribes," and it was further provided that "the rolls so made, when approved by the Secretary of the Interior, shall be final." The person placed on a final approved roll was given by statute the right to receive his equal share of tribal lands and funds in absolute ownership, and provision was made that he first should receive an allotment certificate as "conclusive evidence" of his right to a segregated tract, and later a patent. The last important act to consider, that of July 1, 1902 (32 Stats., 641—Kappler, Vol. I, 776), was passed in the light of the long and, to Congress, unexpected delay that had occurred in bringing enrolment to completion, and accordingly, by Section 30 of the act, Congress provided that the final rolls should be made up in lists which should form "part and parcel" of the final approved rolls and be the basis of immediate allotment of land to those enrolled, to the evident end that the development of the country might proceed *pro tanto* without awaiting the laborious ultimate completion of enrolment.

No express authority was conferred on the Secretary of the Interior or any one else to cancel a name on the final approved roll. We understand counsel for plaintiff in error do not contend that there was in terms any authority granted the Secretary of the Interior to strike names from the final rolls he had approved. No implied

authority was given him unless it be derived from his general supervision of enrolments or from the direction that the rolls should be correct rolls. Forfeitures by implication are not favored and so likewise of authority to unmake from the authority to make. A court can pronounce judgment; it cannot, except in strict pursuance of authority conferred, vacate and set aside that judgment once entered. The direction that the tribal rolls and claims of others should be investigated and that then the Dawes Commission and the Secretary should make correct rolls, which when approved should be final, carries with it no implication of revisory power, but in connection with the entire legislation merely evidences the declaration of the law-making power that the rolls as made by the tribes were not to be accepted unchallenged. The direction as to making correct rolls meant no more than this, and cannot be held to imply a continuing grant of power to reverse, review and revise action at any time up to the day of completion of the entire work of enrolment, any more than a statute providing that a justice of the peace shall decide a controversy according to the very right of the matter, authorizes the justice to open suits anew at any time because of a change of mind after he had rendered final judgments.

The primary purpose Congress had in mind is inconsistent with revision of final enrolments by the Secretary. The Territory could not be prepared for statehood by a constant unsettlement of the basis of all prosperity in a new country, namely, security of property rights and titles. Revision of enrolments likewise is inconsistent with the terms of the act of 1902 by which it was expressly directed, in pursuance of the national policy under which Congress began the work, that final enrolments

should be made in lists which, when approved by the Secretary of the Interior, should be "part and parcel of the final rolls upon which allotment of land and distribution of other tribal property shall be made." This and all the other legislation evidence that enrolment meant allotment. Whether competent for Congress to have separated enrolment from allotment or not, the fact is, it did not do so.

A brief consideration of the consequences and results of enrolment, we submit, negatives any idea of implied authority in the Secretary to cancel enrolments, either at his pleasure or for cause. We are not now discussing the equity powers of the courts in cases where, after action by the Secretary, it appears there was fraud or gross mistake. By the statutes, as seen, once an applicant was enrolled he became entitled to select in severalty in allotment his proportionate share of the lands theretofore held by the tribe in common under a qualified fee, which fee Congress in him made an absolute fee simple in severalty. After nine months from date of allotment he became entitled to an allotment certificate, which was declared to be "conclusive evidence" of his right to the land. Forever after it was the duty of the Indian Agent on demand forcibly to eject any other occupant of the land and to put the allottee in exclusive possession. Likewise after enrolment the allottee was privileged to contest any other allottee's selection for a period not exceeding nine months. After receipt of an allotment certificate the allottee became entitled to a patent, issuance of the same being a mere ministerial act (Garfield *vs.* United States ex rel. Belle Frost, 30 App., D. C., 165). Certain town site funds have been distributed in the Choctaw Nation. The party enrolled was given his distributable share of

these funds, save in some instances where cancelation occurred prior to actual disbursement to the applicant, and the past summer another distribution was made, excluding the present defendants in error, however. If not entitled thereto then to the extent of the canceled applicant's share of payments made him, all other tribal members have been deprived of their just due. The disbursing officers have paid out money wrongfully and perhaps are liable. Other funds are yet to be distributed.

From date of selection of an individual land holding the allottee was entitled to lease his land for mineral, agricultural, stone, grazing and other purposes. Beneath the surface of the land in many allotments valuable oil pools have been discovered and the allottees have been permitted to and have leased the same on a royalty basis or have operated oil wells themselves. The result has been to put royalties or cash into the pockets of the allottee, and, where leased, to permit strangers to take from the land its wealth by contract with a party having no rights in the land. The land has been denuded by strangers to the title, to the spoliation of those entitled thereto. This has been accomplished by approval of leases by the Secretary of the Interior and in some cases of the courts.

Would any other than the most express language give sanction to a power that naturally if exercised would lead to such results?

Of the claim advanced by counsel for plaintiff in error, on page 25 of their brief, that the practice of the Secretary of the Interior in striking names from the approved rolls because he felt he had approved enrolments by mistake was "apparently so notorious and so widely extended that it may fairly be said to have been recognized and approved by Congress in its subsequent legislation," we

submit there is no evidence that Congress knew of the practice or of his exercise of the power the Secretary claimed. If reported at all to Congress, it certainly was merely incidental to some other matter, and counsel know of no records evidencing Congressional knowledge of the matter, and even if reported to Congress would not justify an assertion of Congressional sanction in the absence of action by Congress. The total number prior to 1907 was not over five hundred, and the ground in many instances was because the parties were since found to have died before September 25, 1902, the date of ratification of the Choctaw-Chickasaw agreement approved July 1, 1902 (32 Stat., 641—Kappler, Vol. I, 771); many others were negroes, many infants, and very few were of intelligence and capable, if having rights, of knowing or asserting the same. Proof of this is to be found in the fact that none could alienate their lands or make any contract with reference thereto without removal of their restrictions by the Secretary of the Interior, who to them represented, as he frequently exercised, almost absolute power. Counsel know of nothing to show that the attention of Congress was ever specifically directed to the matter. The power was exercised and taken for granted. Its exercise was not a matter of more than a comparatively short time, and in view of the plain terms of the statutes a long exercise of such authority would not be controlling on the courts.

Houghton *vs.* Payne, 194 U. S., 88.

The claim of such sanction by reason of the statute of limitations contained in the act of April 26, 1906, when Congress had grown tired of the length to which the existence of the Dawes Commission had been prolonged

and of the negro-Indian blood paragraph of that act, is so well answered in the opinion of the lower court (Rec., p. 39) as to need no response by counsel thereto.

The Secretary of the Interior, having been invested with authority to approve the rolls, his approval, whether right or wrong, is not open for review here.

> Steel *vs.* St. Louis Smelting Co., 106 U. S., 228.
> Johnson *vs.* Towsley, 13 Wall., 83.

Having approved the final rolls, the Secretary had exhausted his discretion. His approval of enrolment ended authority in him. The law conferred no further power or authority upon him, and in the absence of statutory authority to proceed further and to cancel, his jurisdiction had ceased and determined. Once declared to be citizens, by operation of law the defendants in error became entitled absolutely and of right to a vested interest in tribal lands and funds.

However vast his power may have been in the Indian Territory, the grant of authority to enroll was but to make of the Secretary of the Interior a special tribunal of limited jurisdiction. It is hornbook law that such tribunals are in their powers strictly limited by the terms of the statute creating them and cannot exceed their granted powers. As applied to executive officers this doctrine is thus expressed:

> "Executive officers derive their powers from the statutes. Not only must an officer have jurisdiction of the subject matter, but he must also keep within the limits of the power conferred on him by statute."
>
> United States *vs.* McDaniel, 7 Peters, 1-14.
> United States *vs.* Thurber, 28 Fed Rep., 56.

The statute having provided that the rolls when approved by the Secretary should be final, it precludes any contention that the rolls so approved are not final but are subject to revision within the Department and cancelation for any cause, good or bad.

In Johnson *vs.* Towsley, *supra,* the Court considered the act of June 12, 1858, which as to pre-emption contests provided: "That appeals from the decision of the district officers, in cases of contest between different settlers for the right of pre-emption, shall hereafter be decided by the Commissioner of the General Land Office, whose decision shall be final, unless appeal therefrom be taken to the Secretary of the Interior." Held, that the word "final" meant that "with the single exception of an appeal to the Secretary of the Interior his (the Commissioner's) decision should preclude further inquiry in that Department."

If it be contended that the rolls were not complete when defendants in error were approved, it is sufficient to say that the several statutes show that the clear intention was to make rolls final as fast as lists of names were sent up and approved, but to leave the making of new lists open until the final closing of the rolls, March 4, 1907.

Any contention that because of his general power of supervision over enrolment, allotments and the Five Civilized Tribes the Secretary must be held to have power to cancel enrolments which he ascertains he has approved by reason of fraud or mistake of law, counsel think can best be answered by citation of the case of Mosgrove *vs.* Harper, 33 Oregon, 252, wherein it was held that the Secretary was without authority for any cause to cancel a once approved lease. An Indian woman had leased certain lands upon terms and conditions prescribed

by the Secretary of the Interior and with his approval. Subsequently the Indian allottee alleged the lessor had obtained his lease by fraud and duress. After a hearing the Secretary of the Interior found the allegations to be true and ordered the lease canceled. The Supreme Court of Oregon found that the statutes did not directly or indirectly "authorize the Secretary of the Interior or any other special tribunal to cancel or annul a lease made by an Indian allottee after the same has been approved by him." As to the contention that the Indian was a ward of the Government, that the Secretary of the Interior was specially charged with administration of Indian affairs, and that the power claimed was necessary to the protection of these wards of the nation, the Court said:

> "But a sufficient answer to this contention is that no such power has been conferred upon him, and that the courts of the country are constituted for the purpose of administering appropriate relief in such cases. And the assumption of a power not conferred by law finds no justification in the fact that a mischief may be thereby suppressed, or a particular right maintained. If, in the administration of Indian affairs, such a power ought to have been vested in the Secretary of the Interior over contracts of leasing made by the allottees, Congress alone could have conferred it. But, no such power having been conferred, its existence must be denied."

These remarks are entirely consistent with the opinion of this Court in Stephens *vs.* Cherokee Nation, and Choctaw Nation *vs.* Robinson, 174 U. S., 445. In those cases the point involved was not the power or authority of the Secretary of the Interior by virtue of his general super-

vision of enrolments and allotments in the Five Civilized Tribes to review, revise and reverse former approval of final rolls, and likewise was not the power, *even of Congress or of courts,* to reverse such approval after distribution to enrolled citizens of tribal lands in absolute several ownership and of tribal funds in absolute personal right. In the cases referred to the proposition decided by this Court was simply "the exemption of these judgments (the judgments of the district courts for the Indian Territory) from review," by a court subsequently created by Congress and expressly vested with jurisdiction over these court judgments if appealed to it on the ground that under the act of June 10, 1896, these judgments had been made final and that thereby vested rights were acquired beyond the constitutional power of Congress to disturb. On this point this Court, after calling attention to authorities holding that "the grant of a new remedy by way of review has been often sustained under particular circumstances," and to the fact that the United States Court in the Indian Territory is a legislative court and part of the machinery devised by Congress in the discharge of its duties in respect of these Indian tribes, said:

> "In its enactment Congress has not attempted to interfere in any way with the judicial department of the Government, nor can the act be properly regarded as destroying any vested right, since the right asserted to be vested is only the exemption of these judgments from review, and the mere expectation of a share in the public lands and moneys of these tribes, if hereafter distributed, if the applicants are admitted to citizenship, cannot be held to amount to such an absolute right of property that the original cause of action, which

> is citizenship or not, is placed by the judgment of a lower court beyond the power of re-examination by a higher court though subsequently authorized by general law to exercise jurisdiction."

And later this Court expressed its view of the real proposition at issue in that case by saying, when discussing the point raised that the vesting in the Dawes Commission under the acts of 1896 and 1897 of the power to investigate and make rolls was in excess of the authority of Congress:

> "The lands and moneys of these tribes are public lands and public moneys, and the assertion by any particular applicant that his right therein is so vested as to preclude inquiry into his status involves a contradiction in terms."

This Court in the course of its opinion called attention to the fact that the judgments of the district courts in the cases before it were rendered before the passage of the Curtis Act of June 28, 1898, and that the effect of that act necessarily was not considered, and in conclusion upheld the constitutional power of Congress in general; but, evidently lest its opinion might be misconstrued and given a wider application than the Court's real decision, ended with this cautionary observation:

> "In so holding we do not intend to intimate any opinion as to the effect that changes made thereby, or by the agreements referred to, may have, if any, on the status of the several applicants, who are parties to these appeals."

The constitutional power of Congress to provide for appellate review of judgments as to Indian citizenship,

involved in Stephens *vs.* Cherokee Nation, and also where the matter appears not complicated by grant of allotment certificate or of patent, is quite distinct and apart from the question here involved of the power of the Secretary of the Interior to cancel enrolments after approval by him of final rolls, allotments of lands to the enrolled and issuance in some cases of allotment certificates (Goldsby and Ida Allison), and patent in another (George Allison). Whether Congress at the length to which matters had gone in the pending cases could divest the defendants in error of their rights and their places on the rolls is, we submit, open to most serious question, but conceding such plenary power to Congress for purposes of argument only and saving discussion thereof for a necessary occasion, obviously existence of plenary power in Congress over enrolments prior to the vesting of landed rights in severalty, as decided in Stephens *vs.* Cherokee Nation, *supra*, does not mean subsisting plenary power in the Secretary of the Interior after enrolment and allotment.

Enrolment gave a vested right to an undivided interest in the tribal estate, real and personal, with the privilege, subject to priorities of others, of segregation of such undivided interest. Allotment gave a vested right, subject to contest for a limited time by others, to a segregated tract of land. Issuance of the allotment certificate completed the rights of the allotment and made his title for all practical purposes complete. The allotment certificate was "conclusive evidence" of right of the citizen to the land segregated. Thereafter issuance of the patent added but a more formal muniment of title.

Counsel for defendants in error at this point desire respectfully to note what they believe an error in the opinion of the court below in their favor. That opinion says:

> "It is quite true that individual members of the Indian tribes had no vested rights in the lands by virtue of enrolment only."

By the agreements between the Indian Nations and the United States it was provided that "allotment of land and distribution of other property shall be made" upon the lists comprising part and parcel of the final rolls (Rec., p. 14), and by treaty (Rec., p. 2) long antecedent thereto the Indian lands were conveyed to them, "to be held in common, so that each and every member of either tribe shall have an equal, undivided interest in the whole." Tribal membership therefore means property rights under the statute, and enrolment does not confer a vested right. And counsel do not understand that this court in asserting the plenary power of Congress over Indian tribes ever has held that Congress could impair the contract property rights of an individual Indian any more than that of other citizens, and in the present cases Congress did not so attempt, but just to the contrary. We think the fact that this court in the Stephens case protected the landed rights of those Cherokee intermarried whites marrying prior to 1875 is an indication that *acquired* Indian property rights are as sacred as any other property rights.

Counsel for ~~defendants~~ plaintiff in error insist that enrolment means allotment, and that the ~~defendants~~ plaintiff in error have the same right to cancel enrolment and an allotment certificate that he would have to cancel a receiver's certificate. We submit the difference between the two is marked. Conceding that Congress could confer power on the Secretary to cancel an allotment certificate, it has not done so, whereas such express authority has been by statute con-

ferred as to receivers' certificates, and the change in the statute naturally was followed by a change in the current of judicial decision.

Lytle *vs.* Arkansas, 9 How., 333.
Orchard *vs.* Alexander, 157 U. S., 372.

The right to public lands is not complete until the action of the register and receiver of the Land Office is approved by the Commissioner of the General Land Office and the Secretary of the Interior, because by statute they now are vested with supervisory control; but under the general land laws there are stages at which their action is beyond recall.

U. S. ex rel. McBride *vs.* Schurz, 102 U. S., 407.

And, even with the supervisory power vested in the Secretary, the receiver's certificate carries with it property rights which cannot be lightly set aside by the Secretary. As said in Orchard *vs.* Alexander, *supra:*

> "The party who makes proofs, which are accepted by the local land officers, and pays his money for the land, has acquired an interest of which he cannot be arbitrarily dispossessed. His interest is subject to state location."

And again, in Brown *vs.* Gurney, 201 U. S., 192:

> "The final certificate issued by the receiver after the submission of final proof and payment of the purchase price, where such is required, has been repeatedly held to be for many purposes the equivalent of a patent."

The cases arising in this Court under special acts go much further and are more nearly analogous to the situation presented by the issuance of allotment certificates, especially under the Choctaw-Chickasaw agreement of July 1, 1902, and to almost or quite the same extent under the Cherokee agreement of the same year. The allotment certificates, like certification of lists of lands under these special acts, convey a title as complete as patents.

Among these cases are Frasher *vs.* O'Connor, 115 U. S., 102, where it was held: "Lists of lands certified to the State by the Commisioner of the General Land Office, and the Secretary of the Interior, convey as complete a title as patents"; Noble *vs.* Union River Logging Co., 147 U. S., 165, wherein it was held that after the Secretary had determined that the facts as to a certain railway brought it within a certain class, and had approved the profile map of the road, he could not, when later convinced that his approval had been obtained by fraud, cancel or take away the rights conferred by executive act, but must proceed in court.

Other cases in point are:

Stark *vs.* Starr, 6 Wall., 402.
Barney *vs.* Dolph, 97 U. S., 652.

It is true, of course, as said in Butterworth *vs.* United States, 112 U. S., 50, that "each case must be governed by its own text, upon a full view of all the statutory provisions intended to express the meaning of the legislature," but if analogies are to be made they should be with legislation more nearly akin, as in the cases just cited, to the segregation of lands in severalty and allotment to the enrolled members of the Five Civilized Tribes than with cases under the present general land laws as amended since 1836.

Patent to the public lands, it has been held, is but evidence of the right and title thereto of the patentee. The patent being but evidence, relates back to the inception of the equitable right (Detroit Lumber Co. *vs.* United States, 200 U. S., 335). The allotment certificate by statute is not the equitable right, but the "conclusive evidence" of the right, title and interest in and to the land of the allottee (Sec. 23, Choctaw-Chickasaw agreement of July 1, 1902). Enrolment gave a vested right to an undivided share, and the allotment certificate was the conclusive evidence of the right to a particular segregated tract, and the patent but a more formal and recorded muniment of title.

Wallace *vs.* Adams, 143 Fed., 716.
Garfield *vs.* United States, ex rel. Frost, 30 App., D. C., 165.

The foregoing, we submit, makes it clear, first, that by enrolment on the final approved rolls a vested right accrued to the enrolled, and that that vested right by grant of the allotment certificate had ripened into an absolute estate in fee simple equivalent to title by patent, issuance of patent being merely ministerial. In the case of defendant in error, George A. Allison, patent had issued and been recorded when he and the other defendants in error on March 4, 1907, the last day for completion of the rolls, were by one sweeping order stricken from the rolls and their rights declared canceled.

The act of cancelation was tantamount to a forfeiture so far as the defendants in error were concerned. In Richardville *vs.* Troop, 28 Fed. Rep., 53, Mr. Justice Brewer held: "He (the Secretary) has no judicial power to adjudge a forfeiture."

Only the most imperative and express statutory direction could warrant cancelation of names on the final approved rolls, conceding that Congress could exercise such power, and no claim, we understand, is made of express grant of such power, but only an implied right of cancelation from general superintending power over enrolments and alleged acquiescence by Congress in such action by the Secretary. Even Congress, however, could not without a breach of faith have undertaken to grant such authority, for the rolls were made as the result of solemn convention between the tribes and the United States, and, as to the allottable lands, they were the property of the members of the tribes in absolute right, the reversionary interest of the United States concededly having been parted with.

We respectfully urge, therefore, that the Court find the Secretary of the Interior without jurisdiction under any condition to cancel names once enrolled on the final approved rolls and not place its judgment on the second point about to be advanced. All told, more than two thousand names were stricken from the final approved rolls, of whom over fifteen hundred were stricken off on the last day without notice. The number left on the rolls was approximately ninety-seven thousand. If any are improperly on the rolls the courts are open and equity's usual powers still exist.

**Even Were Jurisdiction to Cancel Names on the Final Approved Rolls Conceded, Notice and Opportunity of Hearing in Defense Are Absolute Pre-requisites to Its Exercise.**

In all the statutes, rules and regulations respecting enrolment and allotment in the Five Civilized Tribes, notice

and an opportunity to be heard were sedulously provided for. Thus, in the act of June 7, 1897, it was provided that—

> "Any name appearing on such rolls (the tribal rolls) and not confirmed by the act of June 10, 1896, as herein construed, may be stricken therefrom by such (the Dawes) Commission where the party affected shall have ten days previous notice that said Commission will investigate and determine the right of such party to remain upon such roll as a citizen of such Nation."

The other statutes likewise provided against arbitrary or *ex parte* action, and in the rules and regulations, customs and practice adopted under direction of the Secretary of the Interior for determination of right to tribal enrolment the same protection in this inherent right of notice and a hearing as required by "due process" was a prominent feature of all proceedings. The answer of the Secretary admits that this was true as to all matters leading up to enrolment, and it is likewise admitted that, although there was no specific rule or regulation requiring the giving of notice of cancelation of enrolment, for at least three years prior to the time the names of the defendants in error were stricken from the rolls, it had been the custom or practice to give notice and afford the party concerned an opportunity to be heard (Rec., p. 26). The excuse for not giving notice in this instance is that there was no time within which to give it prior to the closing of the rolls. In other words, that necessity of the eleventh hour after ten years within which to make correct rolls was the mother of the invention of a power inconsistent with fundamental constitutional provisions of all governments republican in form.

It is a fundamental part of the American judicial system that any party claiming a right shall not be foreclosed of that right without his day in court, and this doctrine has application to inferior tribunals charged with special duties equally with those courts of general jurisdiction.

Enrolment to the applicant meant much; it was a valuable pecuniary right, and to many of them an honorary distinction, or so considered. To say that a party possibly having no rights, but advancing an absolutely baseless claim to Indian citizenship, must have notice, and yet that a person who was placed on the rolls after due inquiry and an opportunity to the party seeking enrolment and to the nation that might have an interest in protesting his enrolment to be heard is not entitled to notice or a hearing where it is proposed to cancel his enrolment, won after a fair contest, seems such a plain travesty on justice that argument is almost unnecessary. Whatever the necessities of the Department may have been, they cannot justify such an invasion of private right. Furthermore, the power was exercised as to parties in whom rights had long since vested, and in many instances where those rights for valuable consideration had been transferred to bona fide purchasers taking property in reliance on the final enrolment and the Government records, for the parties had the right to sell where alienation was not inhibited or the restrictions, if once on, had been removed.

United States *vs.* Detroit Lumber Co., 200 U. S., 335.

In People ex rel. Van Petten *vs.* Cobb *et al.*, constituting the New York Civil Service Commission, 13 App. Div., N. Y. Reports, 56, the court considered the case of one who had been stricken from the civil service list

of eligibles without notice. A veteran had been placed on the civil service eligible list irregularly, and, as matter of fact, was not physically competent for the position. As a veteran he had preferential right of appointment. The court held that no power was conferred on the Civil Service Commission to strike from the list of eligibles the name of a veteran duly and regularly placed on the list. In any event, it said that no name could be stricken therefrom and former action vacated without notice, and granted mandamus to restore the name to the rolls.

If this were so as to a person having none other than a claim to possible appointment to office, how much truer is it where the right inherent in enrolment is to select, in the Cherokee Nation, one hundred and twenty acres of land, and in the Choctaw and Chickasaw Nation three hundred and twenty acres of land, and obtain the same in absolute fee simple, and to share in any distribution, present or prospective, of tribal funds aggregating millions of dollars.

This Court in a number of cases has had before it the question, under particular circumstances, of the right of the Secretary of the Interior to cancel entries of public lands prior to issuance of patent. After the decisions of this Court in Lytle *vs.* State of Arkansas, and other earlier cases, the public land laws were so amended as to confer on the Secretary of the Interior express power to cancel patents remaining unissued. Yet this honorable Court has held that wherever attempted the cancelation must be upon notice and after hearing, and that it cannot be exercised arbitrarily or capriciously. In Orchard *vs.* Alexander, 157 U. S., 382, it said:

> "Of course, this power of reviewing and setting aside the action of the local land officers is, as was

> decided in Cornelius *vs.* Kessel, not arbitrary and unlimited. It does not prevent judicial inquiry. The party who makes proofs, which are accepted by the local land officers, and pays his money for the land, has acquired an interest of which he cannot be arbitrarily dispossessed. The Government holds the legal title in trust for him, and he may not be dispossessed of his equitable rights without due process of law. *Due process in such case implies notice and a hearing.*"

Enrolment was, in effect, the execution of a contract between the individual, the Indian Nations and the United States in accordance with conventions assented to by the United States and the other parties. Canceling an executed contract is an exertion of the most extraordinary power of a court of equity.

> Atl. Det. Co. *vs.* James, 94 U. S., 207.
> Conner *vs.* Groh, 90 Md., 686.

**Even Conceding Jurisdiction and Power Without Notice to Cancel, the Secretary's Cancelations as to Defendants in Error Were Erroneous and Without Cause.**

Counsel for defendants in error contend that as a matter of birthright, of recognition by the tribes, and of law their original enrolment on the admitted facts in the record was proper, and that the action of the Secretary of the Interior in canceling their enrolment was without just cause on the facts in their case conceded in the record and the statutes applicable thereto. The spirit of the entire legislation with respect to the making of the rolls of the Five Civilized Tribes was liberal and designed to afford a

fair opportunity for a just determination of the question whether or not applicants had blood of the Indian tribe of which they claimed to be members, or had rights by reason of tribal recognition or intermarriage, and was opposed to any narrow and illiberal construction that would shut parties out from enrolment on technical grounds of estoppel or failure to appeal. The parties concerned, if entitled to enrolment, were in the eyes of the law *inops consilii*.

The striking of the names of the defendants in error from the rolls was due to a misapplication and misconception on the part of the Secretary of the Interior of the facts in the case of William T. Thompson decided by the Attorney-General and the force and effect of that opinion. In his haste the Secretary failed wholly to distinguish between varying states of facts, and applied the Thompson ruling rigorously and radically to persons who did not come within its purview. The case of William T. Thompson was passed on by the Choctaw and Chickasaw Citizenship Court under the act of 1902, and he was denied the right to enrolment by that court, whose decision the Attorney-General held under the statute was final. In the case of the Allisons they were members of another tribe, the Cherokee Tribe, and their case never was before the Choctaw and Chickasaw Citizenship Court. The Secretary struck them from the rolls on the ground that they had been denied by the Dawes Commission under the act of June 10, 1896, and that no appeal had been taken from such judgment, the Secretary ignoring the fact of the passage of the later act of June 28, 1898 (Allison Rec., p. 15), and that the Allisons prior to 1896 were on tribal rolls, so that under the act of 1896 the Dawes Commission had no jurisdiction but to transcribe their names

from the tribal rolls to their own rolls. In the case of Goldsby, he was enrolled by the Dawes Commission as a citizen of the Chickasaw Nation under the act of June 10, 1896, and that decision on appeal by the Chickasaw Nation was affirmed by the United States District Court. His case never was removed, either by the Nation or himself, to the Choctaw and Chickasaw Citizenship Court. Goldsby and the Allisons were on the rolls of their respective tribes. These statements of fact show plainly the possibilities of wrongful results from one general blanket order of cancelation. The effect of the cancelation of the enrolment of defendants in error is to hold that had the Dawes Commission never considered their enrolment under the act of 1896, it might enroll them under the act of 1898, but that the Allisons lost their rights by original denial by the Dawes Commission, notwithstanding that Commission's only function under the act of 1896 was to transcribe their names, and Goldsby because he won before the Commission and the United States Court, but failed, *though successful,* to appeal.

It may be contended that if it be conceded that the Secretary of the Interior had jurisdiction without notice to cancel the enrolment of any person, then his act in canceling the enrolment would be a matter as to which there would be no right of review by the courts, under the authorities cited in the early part of our brief. We think, however, that the situation is different, and that while the Secretary might, conceding his power without notice for purposes of argument only, have the right without review originally to deny an applicant enrolment, it by no means follows that after he has approved a final roll containing the names of the applicants, he would then have the same unlimited discretion of striking names from

the rolls where the ground was not one of fact but of plain law. In the first place, his discretion would be derived from express statutes. In the second, simply from his power of supervision and the direction to make correct rolls. After enrolment, conceding, as stated, for the purposes of argument, his power, it could be exercised only for just cause, as in the public lands statutes and decisions; and whether or not there had been just cause, we think, where the matter at least is one of law and not of fact, that the court in virtue of its general powers could ascertain whether or not the Secretary's ruling was correct, and, indeed, put the burden of so proving on him, and if it appeared the law was plainly against him, grant mandamus.

A determination of the merits of enrolments of defendants in error makes it necessary to analyze carefully the acts of 1896, 1897, 1898, 1900 and 1902, referred to in the transcript of record. By the act of 1896 tribal rolls were confirmed. The Dawes Commission construed this act contrary to its plain and unambiguous language and undertook to strike from the rolls names of parties whom it deemed not entitled to enrolment. That this act was not open to such a construction, we think, is plain, as it in so many words confirmed the tribal rolls and the Dawes Commission's report of 1895 shows the fear, when the act of June 10, 1896, was passed was that the tribes might decitizenize. If, however, the express language of the act were at all open to question, the short limitation of time given the Commission within which to complete the rolls, namely, six months, would be a sufficient indication that it never was the intention of Congress, *in the act of 1896,* that the Commission should go behind the

tribal rolls and make an investigation of the citizenship status of the thousands of Indians and intermarried whites and negroes comprising the Five Civilized Tribes. The rolls as completed comprise over 97,000 names, and thousands more were rejected.

The Dawes Commission, however, construed the act otherwise, and the result was a ten-year prolongation of the determination of Indian citizenship in the tribes affected and of the life of the Commission.

In 1897 the confirmed rolls were circumscribed, as a result of the Commission and the Indian Nations appealing to Congress, and then, in 1898, Congress enacted legislation that limited very closely the rolls which should be treated as confirmed, in the end absolutely throwing open all rolls, save the Cherokee roll of 1880 and the Dunn Creek roll, to investigation and to elimination from the rolls of all parties placed thereon either through fraud or mistake of law, this legislation being a comprehensive act that contemplated and was construed as a new beginning of the work of enrolment.

Prior to this legislation, however, a number of persons who had been denied enrolment, and who were not on any tribal rolls, and who did not come within the terms of the statutes of 1896 confirming the right of persons whose names were on tribal rolls, but who nevertheless under the act of 1896 had the right to make application, either themselves appealed, or, when winning before the Dawes Commission, had their cases appealed by the Nations to the United States District Court, which passed on the right to enrolment of these so-called "court claimants." An examination of the act of 1896, we think, will show that it never was intended by that act that the district courts should have any jurisdiction of persons found

to be on the tribal rolls—in other words, that where a party was on a tribal roll the ascertainment of that fact was the sole and only function of the Dawes Commission, save the transcription of the name from the tribal rolls to the rolls of the Commission. The Allisons were admittedly on the rolls and had been adopted into the Nation by act of the Cherokee Nation's Council, passed in 1894 (Allison Rec., p. 16). The fact that it did take jurisdiction, however, and undertake to pass on tribal rolls confirmed by the act of 1896, did not prevent the party affected from applying under the act of 1898, and did not make necessary any action by the parties so far as concerned the United States District Court, inasmuch as they would not be concluded by its determination in view of the subsequent act of June 28, 1898. The act of 1896 said in terms that the judgments of the United States District Court should be final, and likewise gave finality to the decisions of the Dawes Commission where no appeal was taken to the court. But that finality had reference only to those persons not on any tribal rolls, and entitled to rights, if any, solely because the tribes improperly denied them a place on their rolls in order, as stated in a Congressional report made in 1894, to de-citizenize them.

When Congress, therefore, passed the act of 1898 and gave the Dawes Commission authority to—

> "investigate the right of all persons whose names are found on any other rolls (than the Cherokee confirmed roll of 1880 and the Dunn Creek roll) and omit all such names as may have been placed thereon by fraud or without authority of law, enroling only such as may have lawful right thereto,"

the manifest intention of Congress was not to foreclose from investigation any persons, such as all the present defendants in error, who had been by the act of 1896 confirmed through presence of their names on the tribal rolls, but simply to permit the Nations to contest their right to enrolment if their place on the tribal rolls was fraudulent or illegal. The fact that the Dawes Commission wrongfully had construed the act of 1896 gave no such finality to its determination, or to that of the United States District Court, as precluded inquiry under the act of 1898. In other words, the action taken by the Dawes Commission under the act of 1896, and by the United States courts on appeal, so far as concerned persons on tribal rolls, was *ultra vires*.

This act of 1898 was confirmed by the act of May 31, 1900, so far as concerned all persons who at any time had been "recognized citizens" of any one of the Five Civilized Tribes, all defendants in error, by concession in the pleadings herein being "recognized citizens."

Under the acts of 1898 and 1900, however, the Dawes Commission and the Interior Department in reaching their conclusions as to citizenship had considered the fact that a party had been passed on by the United States District Court as one, if not a chief, factor in determining his right to enrolment. When Congress came to consider the situation as it existed, it reached the conclusion, in view of the allegations made by the Choctaw and Chickasaw Tribes or their attorneys, (who on a contingent fee basis were bitterly contesting enrolments and received a fee of $750,000 as the result) that the United States District Court had not, or perhaps might not have, proceeded in accordance with the law. In other words, that it was open to question. It decided that these two Nations

should have the right of a judicial determination of their claims that the procedure and practice of the United States District Court in trying these cases was not in conformity with the statute. The claim of the Nations was that the United States courts had acted without notice to both Nations, and that notice to only one Nation was not sufficient to have given these United States courts in the Indian Territory jurisdiction, inasmuch as each Nation had a share in the tribal domain. And, furthermore, that these courts had tried citizenship cases *de novo,* when their function was confined to a review of the action of the Commission to the Five Civilized Tribes on the papers and evidence submitted to it.

When Congress came to legislate, therefore, it decided that as to these "court claimants" it, for the purpose of settling all controversy, would provide a new tribunal for the determination of the rights of claimants and of the Nations. In its act approved July 1, 1902, this language was used:

> "Section 27. The rolls of the Choctaw and Chickasaw citizens and Choctaw and Chickasaw freedmen shall be made by the Commission to the Five Civilized Tribes *in strict compliance with the Act of Congress approved June 28, 1898, and the Act of Congress approved May 31, 1900,* except as herein otherwise provided: *Provided, That no person claiming right to enrolment and allotment and distribution of tribal property by virtue of a judgment of a United States Court in the Indian Territory under the Act of June 10, 1896,* and which right is contested by legal proceedings instituted under the provisions of this agreement, shall be enrolled or receive allotment to lands or distribution of tribal property until his right thereto has been finally determined."

We submit that from a reading of this statute, and especially sections 31 and 32 thereof, in connection with the history of the preceding legislation and the provisions of the Acts of 1898 and 1900, the proper construction and interpretation of the Act of 1902 is that it was designed to have application to no person except those whose rights depended, not at all upon the fact that they were on tribal rolls, but that they had been enrolled by action of the United States courts; that is, that they were pure "court claimants," compelled under the act of 1896 to show the tribes had done them an injustice or mistake in not having their names on the tribal rolls, and derived their right accordingly. A purview of the whole legislation shows a purpose on the part of Congress to recognize tribal rolls and persons whom the Nations themselves had recognized, subject only to a right of contest of this *prima facie* entitlement to citizenship if fraud or illegality could be shown in the tribal enrolment. Where parties had no right by virtue of tribal rolls or tribal recognition, but claimed citizenship adverse to the tribal rolls or tribal recognition, then it was intended by Congress that the Choctaw and Chickasaw Citizenship Court should have an opportunity to go to the very right, to use the language of Section 32 of this act, of the controversy.

It will be remembered that Goldsby and the Allisons were on tribal rolls and had tribal recognition. The case of each of these parties, therefore, does not come within the intent of Congress. As to Goldsby, furthermore, it cannot be fairly claimed, in any reasonable view of the Act of 1902, that there was any duty incumbent upon him to transfer or remove his application to the Choctaw and Chickasaw Citizenship Court. Apparently

he was stricken from the rolls because he did not take his case before that court and have it determined there. But, he was on a tribal roll, he had been enrolled by the Dawes Commission under the Act of 1896, and that finding was confirmed by the United States District Court. Both the Nations and the citizens had a right of removal of any case to the Choctaw and Chickasaw Citizenship Court, and it would be a perversion of established judicial principle to contend that the successful party, save in the very plainest statutory case, would be barred from rights because he, the successful party, did not remove his case to some other tribunal. This is opposed to common law principles.

"No statute is to be construed as altering the common law further than its words impart."

Shaw *vs.* Merchants Nat. Bank, 101 U. S., 557.

Counsel for plaintiff in error in their brief assert the Nations had no right of appeal to the Choctaw-Chickasaw Court, and in support thereof cite the opinion of Acting Attorney-General McReynolds (25 Opin. A. G., 155-56). That opinion, however, is erroneous and fails to take cognizance of Section 32 of the act of July 1, 1902. Its conclusion that a successful applicant before the Dawes Commission and the U. S. District Court, such as Goldsby, was compelled to take his own case before the Choctaw-Chickasaw Citizenship Court is predicated wholly on the proposition that the Nations could not remove his case. That predicate was held erroneous in Wallace *vs.* Adams, 143 Fed., affirmed by this court in 204 U. S., 415. It should be stated, however, that this Court, in affirming the judgment of the lower court, stated simply that in the main it concurred in the reason-

ing of the Circuit Court, and did not discuss its remarks on the point here referred to.

In the case of the Allisons it is contended by plaintiff in error that they were removed from the rolls because they were denied admission under the act of June 10, 1896, and took no appeal to the United States District Court, so that the judgment of the Dawes Commission became final, and the merits of their claimed citizenship could not be examined into under the act of 1898. The plaintiff in error fails wholly to recognize the fact that Congress had it within its power at any time, if not satisfied with one method of determination, as decided in Stephens *vs.* Cherokee Nation, *supra,* to provide a new method. It is submitted, first, that inasmuch as the Allisons were on a tribal roll the Dawes Commission, in 1896, had no right to deny them enrolment, and, next, had the Dawes Commission possessed such a right, it was within the power of Congress, and Congress did, lawfully authorize in 1898 by a comprehensive statute on the subject, an examination of their case and a determination of their rights. Those rights having been determined in their favor on the merits under the act of 1898, there was no just ground or good cause for canceling their enrolment because of what was done by the Dawes Commission under the act of 1896.

The action of the Secretary of the Interior, as shown, was the result of an opinion rendered by the Attorney-General February 19, 1907, in what is known as the Myrtle Randolph-W. J. Thompson case. These parties, so far as the opinion in that case shows, were denied enrolment under the act of June 10, 1896, but on appeal were admitted by the United States Court, which decision was reversed by the Choctaw and Chickasaw Citizenship

Court, whose decisions were declared to be final. It is open to serious question whether or not the Choctaw and Chickasaw Citizenship Court had any jurisdiction of the case of W. J. Thompson and Myrtle Randolph, and therefore, whether or not its denial of citizenship to them was void for lack of jurisdiction. However that may be, the cases of these two persons are clearly distinguishable from those of the present applicants.

The Thompson case was sent to the Attorney-General as the result of a controversy partly within the Department as to the finality and effect of court decisions. It was held by the Assistant Attorney-General for the Interior Department in the case of Mary Elizabeth Martin, an applicant for enrolment in the Choctaw Nation, that she was not barred from consideration of her application under the act of June 28, 1898, by reason of the fact that she had been denied enrolment by the Dawes Commission under the act of 1896. In that decision Assistant Attorney-General Campbell held that the Dawes Commission in 1896 had no jurisdiction to deny her enrolment, inasmuch as she was on the Choctaw rolls prior to 1896, and that its assumption of power to deny her enrollment was in excess of its jurisdiction and void, so that her failure to appeal from that decision was no bar to her right. In the well-known case of Wiley Adams, decided May 21, 1903, the Secretary of the Interior made substantially the same ruling. Adams was a white man who about 1877 married a Creek Indian, the widow of a Chickasaw Indian, and by special act of the Choctaw Council in 1884, Adams was admitted to citizenship in the Choctaw Nation. Thereafter he had been recognized as a citizen and permitted to vote in Choctaw elections without question. He was borne on the Choc-

taw Census roll of 1896. The Dawes Commission thereafter denied his application for enrolment and Adams took no appeal. When he applied for enrolment under the act of June 28, 1898, it was held by the Dawes Commission in the first instance, and on appeal by the Secretary of the Interior, that the Dawes Commission had exceeded its jurisdiction in 1896 when it undertook to eliminate names from the tribal rolls, and that as the applicant's name appeared on the Choctaw Census roll, there was no authority to deny Adams enrollment. The Secretary held that not until the act of 1898 was any jurisdiction or authority given to the Dawes Commission to eliminate names from the tribal rolls, and then only for fraud or because enrolment was without authority of law. It was conceded that no fraud existed in Adams' case, and it was ruled that the National Council of the Choctaws had authority to admit Adams to citizenship. In his case and that of Benjamin Vaughan, which followed, the ruling was made that the act of the Dawes Commission in 1898 was *ultra vires* and void, and that the only power of the Commission under that act was the ministerial one of inscribing the names of the persons on the rolls of the Commission after identification as being upon the tribal rolls.

We respectfully submit that these decisions of the Assistant Attorney-General were correct. In the report of the Senate Special Committee on the Indian Territory, made May 7, 1894, it was stated:

> "If citizenship is left without control or supervision to the absolute determination of the tribal authorities with power to decitizenize at will, the greatest injustice will be perpetrated and many good and law-abiding citizens reduced to beggary."

In 1898 the truth of this statement was recognized by these provisions in the Curtis Act:

> "The Commission shall have access to all rolls and records of the several tribes, and the United States Court in the Indian Territory shall have jurisdiction to compel the officers of the tribal governments and custodians of such rolls and records to deliver same to said Commission, and on their refusal or failure to do so, to punish them as for contempt."

This act of 1898, in Section 21, directed the Dawes Commission to—

> "investigate the right of all other persons whose names are found on any other rolls (than the Cherokee confirmed roll of 1880) and omit all such as may have been placed thereon by fraud or without authority of law, enrolling only such as may have lawful right thereto, and their descendants born since such rolls were made."

Again, the act provided in the same section:

> "Said Commission is authorized and directed to make correct rolls of the citizens by blood of all the other tribes, eliminating from the tribal rolls such names as may have been placed thereon by fraud or without authority of law, enrolling such only as may have lawful right thereto, and their descendants born since such rolls were made."

To hold that the act of July 1, 1902, which directed that the rolls should be made up in strict compliance with this act of June 28, 1898, except the special provision

as to persons claiming enrolment "by virtue of a judgment of the United States District Court under the act of June 10, 1896," had the effect of revoking the provisions of the act of 1898, committing all tribal rolls to the investigation of the Dawes Commission and of the Secretary of the Interior, would be in violation of the rules of statutory construction, which require that effect shall be given to all parts of statutes dealing with the same subject, and that several statutes shall be so harmonized if possible as to give force and effect to all the statutory provisions.

"When there are two acts relating to the same subject, effect is to be given to both if practicable."

Chi. M. & St. P. R. *vs.* U. S., 127 U. S., 406.

The statutes may be harmonized and given complete force and effect by holding that all that was intended by the act of July 1, 1902, was to authorize investigation of the claims of "court claimants" who were not on tribal rolls and had no tribal recognition, but who nevertheless claimed that the denial of their rights by the Nation was an illegal decitizenization of them. This view of the act is further confirmed by the provisions limiting the life of the court to 18 months, including the time necessary to bring actions and to determine the two main questions for the determination of which the court was created.

The persons as to whom it is sought to apply technical rules of estoppel are *inops consilii.* Congress, we submit, never intended to bar consideration on the merits of the rights of persons ignorant of established rules of judicial procedure and declared by the legislation under

consideration to be under the parental care of the United States and not *sui juris*.

## Mandamus Is the Proper Remedy.

The principle is elementary that while mandamus will not lie to control the discretion of an executive officer or other tribunal, it is the appropriate remedy where the officer charged with a public duty exceeds his jurisdiction, or where, having exercised his discretion, he has exhausted his jurisdiction and subsequently attempts notwithstanding to exceed and abuse his discretion and authority. We have shown heretofore that cancelation of the names of defendants in error from the rolls of the Five Civilized Tribes was an excess and abuse of discretion. Defendants in error therefore are entitled to the writ of mandamus unless there is a plain, adequate and equally speedy and beneficial remedy at law. Relief in equity even, it is well settled, will not bar the right. The object of the creation of the writ, as stated in Moses on Mandamus, was to enable exact justice to be done; to give the person the precise relief to which entitled. In the case of defendants in error, that is restoration to the rolls, from which they were unlawfully stricken.

The enrolment of defendants in error exhausted judgment, discretion and controversy.

Linn *vs.* Belcher, 24 How. (U. S.), 526.
Steel *vs.* St. Louis Smelting Co., 106 U. S., 228.
Johnson *vs.* Towsley, 13 Wall., 83.
Noble *vs.* Union River Logging Co., 147 U. S., 170.

They are entitled not only, where not already issued, to have patents to their land issued to them, but they are

entitled to keep the same without any cloud on their title, to receive hereafter their undivided share of the surplus lands, and to receive their just share of tribal funds, heretofore or hereafter distributed. In the Choctaw and Chickasaw Nations funds have just been distributed in which Goldsby has not shared because he was canceled from the rolls. Issuance of the writ of mandamus compelling correction of the rolls and restoration to full status of defendants in error is the only single action at least that will give complete relief.

The fact that cancelation on the rolls has been made does not bar relief. The writ lies to correct what has been done in fact by abuse of discretion. Counsel cite to the Court the remarks and authorities in the opinion of the court below on this point (Rec., p. 40). In *ex parte* Com. of Virginia, 100 U. S., 338, this Court said that the use of the writ "has been very much extended in modern times, and now it may be said to be an established remedy to oblige inferior courts and magistrates to do that justice which they are in duty and by virtue of their office bound to do."

In *ex parte* Roberts, 15 Wall., 385, the writ was granted to compel the Court of Claims to correct its records so as to strike out a certain allowance of appeal which had been inadvertently issued.

In Peo. ex rel. Burroughs *vs.* Brinkerhoff, 68 N. Y., 262, it was issued to compel a board of supervisors to correct its records, retrace its steps and then act according to law. See also Peo. ex rel. Van Petten, *supra.*

In Wise *vs.* Biggar, 79 Va., 269, to compel the keeper of the rolls to strike from the rolls and the superintendent of public printing to omit from the acts of the assembly an act the Court deemed not a law.

In Crane *vs.* Barry, 47 Ga., 476, to remove a void judgment from the records and clear any possible cloud its record might have on a party's property.

In Raymond *vs.* Villere, 42 La. Ann., 490, held in a proper case it would issue to compel a recorder of conveyances to cancel or erase certain inscriptions from his books purporting to show ownership of certain real estate in certain persons.

In State *vs.* Mitchell, 31 Ohio St., 592, to compel officers to conform to the requirements of a statute, although they already had acted, but erroneously.

In State ex rel. Brickman *vs.* Wilson, 123 Ala., to compel, after adjournment of the legislature, erasure from the journals of the legislature of entries showing passage of a statute.

See also—

Romero *vs.* Cortelyou, 28 App. D. C.
West *vs.* Hitchcock, 199 App. D. C., 333.
Union Pacific R. R. *vs.* Hall, 91 U. S., 343-53.
Illinois Central R. R. *vs.* Illinois, 163 U. S., 142.
Boston T. Co. *vs.* Pomfret, 20 Conn., 590.
Schmulbach *vs.* Speidel, 50 W. Va., 553.
Baltimore Univ. *vs.* Colton, 98 Md., 623.
Harwood *vs.* Marshall, 9 Md., 83.
Jackson *vs.* State, 57 Neb., 183.
Dawson *vs.* Thurston, 3 Hen. and M. (Va.), 132.
In re Strong, 20 Pickering (Mass.).
Puford *vs.* Fire Dept., 31 Mich.

A claim of discretion will not bar the writ, provided the construction of the acts of Congress is plain and unmistakable, since that would be to enable the executive officer to render valueless the writ of mandamus.

Roberts *vs.* United States ex rel. Valentine, 176 U. S., 221.

**The Courts Have Jurisdiction in the Premises, Inasmuch as the Secretary's Discretion Had Been Exhausted.**

Counsel for plaintiff in error assert that the courts are without jurisdiction and that the acts of the Secretary are beyond review. The point where the courts in general have a right to interfere has been already discussed. In particular the lack of jurisdiction in the courts is asserted on the ground, first, that except for authority conferred by Congress by the Indian appropriation act of August 15, 1894, as amended by the act of February 6, 1901, from the provisions of which acts the lands of the Five Civilized Tribes were specifically excepted, the judiciary, as held by this Court in McKay *vs.* Kalyton, 204 U. S., 458-68, and Hy-yu-tse-mil-kin *vs.* Smith, 194 U. S., 413, had no jurisdiction over allotments of Indian lands. The point, we submit, is without merit and needs no elaborate discussion. All that those cases decided was that, except for these acts, disputes over Indian allotments were *primarily cognizable* by the Secretary of the Interior, and that jurisdiction in such matters was by statute law committed to the Secretary and not the courts. It was not held, however, that *after* the Secretary had acted and had exhausted his jurisdiction and discretion the ancient powers of the courts could not be asserted on well-established grounds. It would be a manifest perversion to assert that acts which enlarged the jurisdiction of the courts over Indians in general narrowed prior judicial jurisdiction as to the Five Civilized Tribes because they were excepted from their operation.

Second. That the courts have no jurisdiction because

the Secretary had no power or jurisdiction originally to enroll the defendants in error. The merits of the claims of defendants in error under the statutes have been already discussed. But, even if the Secretary had erred in originally approving the final rolls containing the names of defendants in error, the point of no jurisdiction would not be well taken. By law jurisdiction of enrolments was committed to the Secretary of the Interior, and his exercise of his discretion, therefore, as shown heretofore (except in cases of exhaustion or abuse) was not open to judicial review (Steel *vs.* Smelting Co. and Johnson *vs.* Towsley, *supra.)*. The point confounds jurisdiction and correctness of determination. The statutes expressly gave the Secretary jurisdiction of the subject matter, enrolment of applicants, and jurisdiction of the persons is conceded. If it be contended that the Secretary wrongly construed the statutes, jurisdiction nevertheless existed. Jurisdiction of the subject matter means simply power to deal with the general subject involved in the action.

Foltz *vs.* St. Louis Railroad, 19 U. S. Appeals, 581, is a case decided by Judges Sanborn, Caldwell and Thayer. It dealt extensively with the subject of jurisdiction, and said:

> "Jurisdiction of the subject matter is the power to deal with the general abstract question, to hear the facts in any case relating to this question, and to determine whether or not they are sufficient to invoke the exercise of that power. It is not confined to cases in which the particular facts constitute a good cause of action, but it includes every issue within the scope of the general power vested in the court by the law of its organization to deal with the abstract question."

In that case the point was made that the railroad company was a foreign corporation, and not one of the parties as to whom the right of eminent domain was granted by the State, and that therefore the Circuit Court was without jurisdiction to render a judgment of condemnation in its favor; that the judgment consequently was a nullity. The Court taking up the claim of want of jurisdiction in the Circuit Court to render a judgment of condemnation, said it would approach the question by conceding, but not denying, that appellee, the railroad company, had no right to condemn land for public use. Said the Court:

> "Wherever the right and the duty of the Court to exercise its jurisdiction depend upon the decision of a question which it is invested with power to hear and determine, there its judgment, right or wrong, is impregnable to collateral attack unless impeached for fraud. When the jurisdiction of an inferior tribunal depends upon a fact which such tribunal is required to ascertain and determine by its decision, such decision is final until reversed in a direct proceeding for that purpose. The test of jurisdiction is whether the tribunal has power to enter upon the inquiry, and not whether its conclusion in the Court ever is right or wrong.
>
> "We have no doubt that it was the right and duty of the circuit court to hear and determine the very question whether or not the appellee had the right to exercise the power of eminent domain, but it entered its judgment in the condemnation proceeding, and that judgment is conclusive evidence that it determine that question in favor of the appellee. The judgment was strictly within the powers conferred upon the Court by the law of its

> organization. It had authority to condemn lands for public use in a proper case presented to it. If that judgment was erroneous, it might have been reversed by writ of error, but the decision of the question was the exercise of jurisdiction."

In Cooper *vs.* Reynolds, 10 Wallace, 308, this Court said that jurisdiction over the subject matter is conferred by the sovereign authority which organizes the Court, and is to be sought for in the general nature of its powers or in authority specially conferred.

In McCloud *vs.* Receveur, 71 Fed. Rep., 455, the Court said that whenever any person is given authority to hear and determine any question, such determination is in effect a judgment having all the properties of a judgment pronounced in a legally created court of limited jurisdiction.

Conceding for the moment, what is not true and is denied, that the Secretary of the Interior erred in his decision that Goldsby was not barred by reason of failure in 1902 to take his case which had been successful before the Dawes Commission and the United States District Court to the Choctaw and Chickasaw Citizenship Court (notwithstanding that he was admitted under the act of 1898), it still would follow that the jurisdiction did inhere in the Secretary of the Interior, and that he had the jurisdiction to consider the matter. An erroneous decision would be simply an erroneous decision, and not a void decision. By law he was given jurisdiction to make the rolls and consider applications of all persons for enrolment. What were the facts as to their case and what action they had taken in the courts, were matters that he had to ascertain in the exercise of his jurisdiction. What, if any, effect he

would give to those facts and any findings, if he found there were findings, was for him to say, and was in the exercise of his jurisdiction. Having jurisdiction, and having decided it, it was not in his power to cancel the decision reached by him. It had the effect of a judgment and was not reversible by himself suddenly and arbitrarily giving a general blanket order.

If any point be raised that no power or jurisdiction now exists to restore to the rolls and to revoke or erase the notations made on said rolls, either generally or because the rolls were ordered closed on March 4, 1907, we submit that the first or general proposition is answered in Romero *vs.* Cortelyou, 28 App. D. C., where the Postmaster-General wrongfully had closed or consolidated the post-office at Las Vegas, New Mexico, and was ordered to reopen it by mandamus. And as to the fact that the final date for enrolments was March 4th, 1907, we submit that this is not an action to place any name on the rolls originally, but by mandamus to compel the rolls to be made to appear as they lawfully were prior to March 4th, 1907, and to compel recognition of and restoration to citizenship of persons duly enrolled but illegally and arbitrarily deprived of rights lawfully conferred within the period of Congressional limitation. To hold otherwise would be to say that the Secretary, without possibility of redress by the courts, could have stricken from the rolls on March 4th, 1907, the entire Five Civilized Tribes.

In conclusion, counsel desire to state, not because deemed important or necessary to the case, but to guard the Court against an inadvertent error, that until the act of April 26, 1906 (34 Stats., 137, Sections 5 and 6,) was

passed, the Secretary of the Interior had no act to perform with reference to allotments and patents in the Choctaw-Chickasaw Nations, as under the Choctaw-Chickasaw agreement of July 1, 1902, those matters were vested in the Commission to the Five Civilized Tribes and the principal Chief and Governor of the Indian Nations (*vide* opinion of the Court of Appeals of the District of Columbia in Garfield *vs.* U. S. *ex rel.* Belle Frost, *supra*). That case is now pending on the docket of this Court on appeal by the Secretary. The rights of defendants in error here to allotments had accrued and were exercised, at least as to selection of allotment, before passage of the act of 1906. Whether that act, being inconsistent with and contrary to the agreement between the Indian Nations and the United States can stand should a case necessary to decision of the matter arise, is not here in controversy.

Respectfully submitted,

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Office Supreme Court, U. S.
FILED.
OCT 24 1908
JAMES R. McKENNEY,
CLERK.

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# Supreme Court of the United States.

OCTOBER TERM, 1908.

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| JAMES RUDOLPH GARFIELD, SECRETARY OF THE INTERIOR, Plaintiff in Error<br>*vs.*<br>THE UNITED STATES OF AMERICA, EX REL. JOHN E. GOLDSBY, Defendant in Error. | No. 248. |
| JAMES RUDOLPH GARFIELD, SECRETARY OF THE INTERIOR, Plaintiff in Error<br>*vs.*<br>THE UNITED STATES OF AMERICA, EX REL. IDA ALLISON, Defendant in Error. | No. 249. |
| JAMES RUDOLPH GARFIELD, SECRETARY OF THE INTERIOR, Plaintiff in Error<br>*vs.*<br>THE UNITED STATES OF AMERICA, EX REL. GEORGE A. ALLISON, Defendant in Error. | No. 250. |

## Supplemental Brief on Behalf of Defendants in Error.

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# Supreme Court of the United States.

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| JAMES RUDOLPH GARFIELD, Secretary of the Interior, *Plaintiff in Error.* *vs.* THE UNITED STATES OF AMERICA, *Ex Rel* IDA ALLISON, *Defendant in Error.* | No. 249. |
| JAMES RUDOLPH GARFIELD, Secretary of the Interior, *Plaintiff in Error.* *vs.* THE UNITED STATES OF AMERICA, *Ex Rel* GEORGE A. ALLISON, *Defendant in Error.* | No. 250. |

## SUPPLEMENTAL BRIEF ON BEHALF OF DEFENDANTS IN ERROR.

In the closing argument of the Attorney General he advanced, on behalf of the plaintiff in error, a contention not embodied in any brief in the case nor alluded to in

argument until the final argument, namely, that there was applicable to the pending cases the principle that mandamus is not a writ of strict right and will not issue in aid of a wrong, or where, though there may be a strictly technical right, there is no justice, but a manifest injustice, in the application for the writ. It also was urged strongly in argument, though the contention finds hardly any place in the brief of plaintiff in error, that the Secretary of the Interior had no jurisdiction to enroll the defendants in error in the first place, and hence this Court has no jurisdiction. It also was urged that under the agreements between the United States and the Indian tribes approved July 1, 1902, enrolments and allotments were only tentative.

Counsel for defendants in error believe the original brief filed in reality disposes of all the arguments on behalf of plaintiff in error, but as these are Indian cases that will affect more than 1,500 persons, though deciding only the cases presented, as the statutes are many and confusing where presented originally, and as the arguments on behalf of plaintiff in error, we believe, only tended to confuse matters further, counsel have taken the liberty of again setting forth the several acts in order and of answering the arguments made.

Before proceeding, however, counsel desire to call attention to these facts:

That the application of each defendant in error was decided on its merits and each applicant found to be a blood descendant of one of the members of the tribe holding the lands and funds in common.

That each defendant in error was by statute declared a ward of the United States and by reason of incompetency to care for his or her own affairs, unable to

alienate her lands or make any contract in reference to the same without approval of the Secretary of the Interior.

That each defendant in error was stricken off on the ground that by waiver or estoppel his rights on the merits were barred of consideration.

**The Secretary of the Interior Had Jurisdiction Because the Statutes Gave Defendants in Error the Right to Apply for Enrolment and the Secretary the Duty of Deciding and of Making Up the Rolls. Original Enrolment of Goldsby Was Correct Because He Was a Blood Member and No Duty of Removal of His Cause Lay on Him; the Allisons Because Being Enrolled by the National Council, the Dawes Commission Had No Jurisdiction in 1896 to Deny Enrolment and Under the Supercessory Act of 1898 No Fraud or Mistake Was Shown.**

The Dawes Commission was created by act of March 3, 1893 (27 Stats., 645 Kappler, Vol. I, 498), and the purpose of its creation was division in kind among the tribal members of the tribal estates of the Five Tribes and preparation of the community for statehood.

Indian Appropriation Act of June 10, 1896 (29 Stats., 321—Kappler, Vol. I, 80):

> "That said commission is further authorized and directed to proceed at once *to hear and determine the application of all persons who may apply to them for citizenship in any of said nations,* and after said hearing they shall determine the right of said applicant to be so admitted and enrolled.

> Provided, however, that such application shall be made to such commissioners *within three months* after the passage of this act. The said Commission shall decide all such applications *within ninety days* after the same shall be made. That in determining all such applications said Commission shall respect all laws of the several nations or tribes, and *shall give due force and effect to the rolls, usages and customs* of each of said nations or tribes. And provided further, that *the rolls of citizenship of the several tribes as now existing are hereby confirmed,* and any person who *shall claim to be entitled to be added to said rolls* as a citizen of either of said tribes and whose right thereto has either been denied or not acted upon, or *any citizen who may desire* such citizenship may apply for citizenship, with provision for an appeal by either the tribe or any person if aggrieved to the United States District Court * * * and the judgment of the court shall be final." (Italics ours.)

The Secretary of the Interior did not figure in this statute at all.

Indian Appropriation Act of June 7, 1897 (30 Stats., 62—Kappler, Vol. I, 88), limited the rolls of citizenship under the Act of 1896 to the last authenticated tribal rolls, "and such additional names and their descendants *as have been subsequently added, either by the council of such nation,* the duly authorized courts thereof, or the commission under the Act of June 10, 1896." A further six months was given for investigation of rolls, but with the provision that no name should be stricken off a tribal roll except "the party affected shall have ten days' previous notice," with right of appeal to the court, as pro-

vided in the Act of 1896. (Italics ours.)

Curtis Act of June 28, 1898 (30 Stats., 495—Kappler, Vol. I, 90), entitled "An act for the protection of the people of the Indian Territory, and for other purposes." This was the first comprehensive act relating to enrolments and allotments in the Indian Territory, and was the first legislation relating thereto not contained in an appropriation bill. It was the first act which conferred powers and duties on the Secretary of the Interior with reference to enrolments. The citizenship provisions were contained in section 21, which, so far as material here, provided:

> That in making rolls of citizenship of the several tribes *as required by law* the Commission to the Five Civilized Tribes is authorized and directed to take the roll of Cherokee citizens of 1880 (not including freedmen) as the only roll intended to be confirmed by this and preceding acts of Congress. And to enroll all persons now living whose names are found on said roll and all descendants born since the date of said roll to persons whose names are found thereon; *and all persons who have been enrolled by the tribal authorities who have hertofore made permanent settlement in the Cherokee Nation whose parents by reason of their Cherokee blood have been lawfully admitted to citizenship by the tribal authorities, and who were minors when their parents were so admitted;* and they shall investigate the right of all other persons whose names are found on any other rolls and omit all such as may have been placed thereon by fraud or without authority of law, enrolling only such as may have lawful right thereto, and their descendants born since such rolls were made, with such intermarried white persons as may be

entitled to citizenship under Cherokee laws.

* * * * * *

Said Commission is *authorized* and *directed* to make correct rolls of the citizens by blood of all the other tribes, *eliminating from the tribal rolls such names as may have been placed thereon by fraud or without authority of law,* enrolling such only as may have lawful right thereto, and their descendants born since such rolls were made, with such intermarried white persons as may be entitled to Choctaw and Chickasaw citizenship under the treaties and the laws of said tribes. (Italics ours.)

By the Indian Appropriation Act of July 1, 1898 (30 Stats., 591—Kappler, Vol. I, 101), it was provided:

"That said Commission shall continue to exercise all authority heretofore conferred on it by law.

"Appeals shall be allowed from the United States courts in the Indian Territory direct to the Supreme Court of the United States to either party, in all citizenship cases, and in all cases between either of the Five Civilized Tribes and the United States involving the constitutionality or validity of any legislation affecting citizenship, or the allotment of lands in the Indian Territory, under the rules and regulations governing appeals to said court in other cases," with further provisions as to time and continuance of the work of the Dawes Commission notwithstanding.

Counsel cite the foregoing confusing statute, which has been heretofore passed on by this Court, so the Court may have a summary of all legislation, but believe it not here material.

Indian Appropriation Act of May 31, 1900 (31 Stats., 221—Kappler, Vol. I, 105):

> That said (the Dawes) Commission shall continue to exercise all authority heretofore conferred on it by law. But it shall not *receive, consider* or make any record *of any application of any person for enrolment* as a member of any tribe in Indian Territory *who has not been a recognized citizen thereof,* and duly and lawfully enrolled or admitted as such, and its refusal of such applications shall be final when approved by the Secretary of the Interior. * * * (Italics ours.)

Indian Appropriation Act of March 3, 1901 (31 Stats., 1073—Kappler, Vol. I, 112):

> The rolls made by the Commission to the Five Civilized Tribes, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon shall alone constitute the several tribes which they represent; and the Secretary of the Interior is authorized and directed to fix a time by agreement with said tribes or either of them for closing said rolls, but upon failure or refusal of said tribes, or any of them, to agree thereto, then the Secretary of the Interior shall fix a time for closing said rolls, after which no name shall be added thereto.

The Indian Appropriation Act of May 27, 1902 (32 Stats., 245—Kappler, Vol. I, 119), fixed the quantity of land which should be "the just and reasonable share of each member" of each tribe under the Curtis Act of June 28, 1898.

Choctaw and Chickasaw agreement, approved July 1, 1902 (32 Stats., 641—Kappler, Vol. I, 776):

The principal provisions of this law, so far as material here, provided in substance, section 27 *et seq.*, that the rolls—

> "shall be made by the Commission to the Five Civilized Tribes, *in strict compliance* with the acts of June 28, 1898, and May 31, 1900, *except as* herein otherwise provided: Provided, That no person claiming right to enrolment and allotment and distribution of tribal property, *by virtue of a judgment* of the United States Court in the Indian Territory under the Act of June 10, 1896, and which right is contested by legal proceedings instituted under the provisions of this agreement, shall be enrolled or receive allotment of lands or distribution of tribal property until his right thereto has been finally determined. (Italics ours.)

Section 30 provided for enrolment and distribution on the basis of approval of rolls in lists as fast as practicable and has been several times set forth in full.

Section 31 recited the claim of both nations that the United States district courts, acting under the Act of June 10, 1896, had admitted persons to enrolment without notice of the Court proceedings to each nation, whereas such notice to both nations was indispensable, and had also tried citizenship cases *de novo*, whereas it should have confined its review to the papers and evidence before the Dawes Commission. It then provided for the creation of a new court, known as the Choctaw-Chickasaw Citizenship Court, to determine the two foregoing questions by means of a suit with the representative defend-

ants. This suit was to be "confined to a final determination of the questions of law *here named,* and shall be without prejudice to the determination of any charge or claim that the admission of such persons to citizenship or enrolment by said United States courts in the Indian Territory was wrongfully obtained as provided in the next section." (Italics ours.) In the event of either contention of the nations as to notice or no *de novo* proceedings was sustained, and "said citizenship judgments are annulled or vacated, then the files, papers and proceedings in any citizenship case in which the judgment or decison is so annulled or vacated shall, upon written application therefor, made within ninety days thereafter by any party thereto, who is thus deprived of a favorable judgment upon his claimed citizenship," be certified to the Citizenship Court where the citizenship case "shall be docketed in said Citizenship Court, and such further proceedings shall be had therein in that Court as ought to have been had in the court to which the same was taken on appeal from the Commission to the Five Civilized Tribes, and as if no judgment or decision had been rendered therein."

Section 32 provided that "said Citizenship Court shall also have appellate jurisdiction" over all court judgments rendered under the Act of June 10, 1896, admitting persons to citizenship or enrolment in either nation. "The right of appeal may be exercised" by the nations jointly or separately. In exercising its appellate jurisdiction the Court was authorized "wherever in its judgment substantial justice will be subserved" to permit "either party to any such appeal to take and present such further evidence as may be necessary to enable said Court to determine the very right of the controversy." The section also gave the Court the same appellate jurisdiction over the district

courts where claimants had been denied enrolment as was given above where the nation had lost, only the notice of appeal was to be given both nations.

Section 33 provided the administrative machinery for the new court, and provided for a fee to the clerk of the District Court for transferring and certifying to the Citizenship Court the files, papers and proceedings in the District Court, the fee to be "paid by the person applying for such transfer and certification." This section then further provided: "The judgment of the Citizenship Court in any or all of the suits or proceedings so committed to its jurisdiction shall be final."

The Court in no event was to continue in existence beyond December 31, 1903.

Section 34 gave the Commission ninety days more time to "receive applications for enrolment only of persons whose names are on the tribal rolls, but who have not heretofore been enrolled by said Commission, commonly known as 'delinquents.'"

Section 35 declared: "No person whose name does not appear upon the rolls prepared as herein provided shall be entitled to in any manner participate in the distribution of the common property of the Choctaw and Chickasaw tribes, and those whose names appear thereon shall participate in the manner set forth in this agreement," and section 11 provided that there "shall be allotted to each member of the Choctaw and Chickasaw tribes as soon as practicable after the approval by the Secretary of the Interior of his enrolment as herein provided," 320 acres of average allottable land.

The Cherokee agreement of July 1, 1902 (32 Stats., 716—Kappler, Vol. I, 787), contained many of the same provisions as the Choctaw-Chickasaw agreement, includ-

ing the direction to allot land as soon as practicable after approval by the Secretary of the Interior of enrolment (section 11); expedition of enrolment by approval in lists (section 29), and that allotment certificates should be "conclusive evidence of the right of an allottee to the tract of land described therein" (section 21). It, unlike the agreements with the other tribes, had special provision cutting out certain intermarried whites from tribal shares (section 26).

The provisions as to citizenship, except that as to partial lists, which was identical save for names of tribes with section 30 of the Choctaw-Chickasaw agreement so far as material here, were in substance as follows:

Section 25: "The roll of citizens of the Cherokee Nation shall be made as of September 1, 1902, and the names of all persons then living and entitled to enrolment on that date shall be placed on said roll by the Commission to the Five Civilized Tribes."

Except as to intermarrieds, the rolls were to be made in strict compliance with the acts of June 28, 1898, and May 31, 1900.

The Indian appropriation Act of March 3, 1903, (32 Stats., 982), provided that "the Supreme Court of the United States may transfer to the Choctaw and Chickasaw Citizenship Court the papers in the cases of Choctaw and Chickasaw citizenship appealed from the United States courts in the Indian Territory to the Supreme Court during the year 1898," the causes transferred to be tried, determined and disposed of as if appealed under the provisions of the Choctaw-Chickasaw agreement of July 1, 1902.

The Indian Appropriation Act of April 21, 1904, (33 Stat., 189-204), provided that the Dawes Commission

should conclude its work and terminate its existence on or before July 1, 1905.

The Indian Appropriation Act of March 3, 1905, (33 Stat., 1048-60), provided that the Secretary of the Interior, after July 1, 1905, should complete the unfinished business of the Dawes Commission.

Act, approved April 26, 1906, to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes:

"That after the approval of this act no person shall be enrolled as a citizen or freedman of the Choctaw, Chickasaw, Cherokee, Creek or Seminole Tribes of Indians in the Indian Territory, except as herein otherwise provided, unless application for enrolment was made prior to December 1, 1905," with provisions against reopening or reconsidering citizenship cases.

Sec. 2. * * * after the expiration of nine months from the date of the original selection of an allotment of land in the Choctaw, Chickasaw, Cherokee, Creek or Seminole Tribes, and after the expiration of six months from the passage of this act as to allotments heretofore made, no contest shall be instituted against such allotment; Provided, *That the rolls of the tribes* affected by this act *shall be fully completed* on or before the fourth day of March, 1907, and the Secretary of the Interior shall have no jurisdiction to approve the enrolment of any person after said date.

* * * * *

Sec. 4. That no name shall be transferred from the approved freedmen, or any other approved rolls of the Choctaw, Chickasaw, Cherokee, Creek or Seminole Tribe, respectively, to the roll of citizens by blood, unless

the records in charge of the Commissioner to the Five Civilized Tribes show that application for enrolment as a citizen by blood was made within the time prescribed by law by or for the party seeking the transfer.

Of the Curtis Act of 1898, we contend that as it was a comprehensive act covering the whole subject embraced in the previous appropriation acts of 1896 and 1897, it was in effect a substitute for and modification of those prior acts, except as the later act read into it, expressly or by implication, the former acts,

Tracy *vs.* Tuffly, 134 U. S., 206;
Dist. of Col. *vs.* Hutton, 143 U. S., 18,

and that under it the duty of the Dawes Commission and of the Secretary of the Interior was to receive new applications claiming citizenship in the Five Civilized Tribes, and also to take the tribal rolls, and where parties were on them to investigate the rolls and if no fraud or mistake was found, to enrol them on the final rolls of the United States. In doing so under the law, of course, due weight would have to be given not only tribal rolls, laws and customs, but the district court judgments. It was competent for Congress if it saw fit to provide new legislation covering enrolments regardless of any finality given by Act of 1896.

Stephens *vs.* Cherokee Nation, 174 U. S., 445.

## Jurisdiction.

The Secretary of the Interior had jurisdiction to enrol all the defendants in error because the subject matter of enrolments was expressly committed to his care. By the Acts of 1896 and 1898 it was the duty of the Dawes

Commission, and under the later act of the Secretary, to "hear and determine the application of all persons who may apply to them for citizenship in any of said nations," to take the tribal rolls as *prima facie* evidence of right, and then "to make correct rolls of the citizens by blood of all the tribes." It is conceded that defendants in error claimed places on the rolls. These facts gave jurisdiction. Conceding, contrary to the record on file in the office of the Secretary, that Goldsby was not on a tribal roll it still would be true the Secretary had a right to determine his application. The decision as to what should be the *effect* of his not transferring his case to the Choctaw-Chickasaw Citizenship Court would be but the exercise of judgment and discretion and jurisdiction, and not jurisdiction itself. The decision would be within the jurisdiction of the Secretary, though the judgment reached might be erroneous. Having jurisdiction, in the absence of an *express showing of facts* that he was wrong in his conclusion, there would be the same presumption of facts in support of his judgment that there would be in the case of any other judicial or quasi judicial tribunal.

In the case of the Allisons, likewise it required the exercise of judgment and discretion to decide whether the Act of 1898 superseded the Act of 1896, or gave a right to pass on the merits of the Allison's right to enrolment, notwithsanding original denial by the Commission under the Act of 1896, but there nevertheless was jurisdiction to "hear and determine" their applications. In their cases, further, there is in the record an express finding of their tribal enrolment (Rec., p. 21), for it is that she was admitted to citizenship by act of the Cherokee National Council in December, 1894, when the children were still minors. That constituted being on the tribal rolls

just as would a special act of the Congress of the United States place a soldier on the pension rolls, and it was so held by the Assistant Attorney General in the Rogers case, printed in the appendix hereto. It was the exercise of jurisdiction to decide whether the Dawes Commission in 1896 had any jurisdiction other than the ministerial duty of transcribing their names.

McNitt *vs.* Turner, 16 Wall., 564:

> Jurisdiction is authority to hear and determine. It is an axiomatic proposition that when jurisdiction has attached, whatever errors may subsequently occur in its exercise, the proceedings being *coram judice*, can be impeached collaterally only for fraud. In all other respects it is as conclusive as if it were irreversible in a proceeding for error.

Daniels *vs.* Tearney, 102 U. S., 418:

> It thus appears that there was drawn in question the authority of the sheriff exercised under a law of the State in taking the bond, and that the decision was in favor of the validity of that authority; and that there was also a right of exemption from liability, claimed under the Constitution of the United States, and that the decision was against the right so claimed. These claims give us jurisdiction. Whether they are well founded remains to be considered. Jurisdiction is only "the right to hear and determine." The result of its exercise is the judgment of the court.

See also, Foltz *vs.* St. L. R., 19 U. S. App., 581;
Gregrion *vs.* Astor, 2 How., 341;
Nash *vs.* Williams, 20 Wall., 226;
Cooper *vs.* Reynolds, 10 Wall., 308.

## The Original Enrolments were Correct.

The record shows that defendants in error all were stricken from the rolls because they were supposed to come within the opinion of the Attorney General of February 19, 1907, in the Myrtle Randolph-William Thompson case. That opinion is printed in the appendix. It shows the point decided was that those parties having removed their cases to the Choctaw-Chickasaw Citizenship Court, under the Act of 1902, the judgment of that Court, pronounced on the merits of their applications and claims and after the Court had gone to the very right of the matter, as required by the statute, was final. Whether the Attorney General's opinion is correct (and Wallace *vs.* Adams indicates it is), or whether the Assistant Attorney General for the Interior Department, whose office had long experience in interpreting these statutes and cases and had grown up, as it were, with the enactment and administration of these laws, and some of which it had drafted probably, and whose opinion differed from that of the Attorney General, was right in having a contrary view, counsel need not discuss. Nor would it be proper, inasmuch as other counsel are attorneys for Myrtle Randolph and William C. Thompson. But, even if this Court had to pass on the statutes and decide whether Goldsby and the Allisons were rightfully entitled to enrolment (a matter we do not believe is the real issue in the case and which we discuss only out of deference to the Attorney General's contentions and complete vindication of our clients), and even if the Attorney General and Assistant Attorney General were in harmony, their views would not control this Court, which in New Haven R. R. *vs.* Interstate Com-

merce Commission, 200 U. S., 361, held:

> "While the construction of a statute by a body charged with its enforcement which has long obtained and which has been impliedly sanctioned by its re-enactment must be treated, when not plainly erroneous, as read into the statute, its binding force is restricted to the exact point passed on."

In the case of the Allisons there was no Cherokee Citizenship Court, and any claim against them is made on the ground that, inasmuch as they had been denied enrolment by the Dawes Commission under the Act of 1896, the Commission was barred from considering their case under the Act of 1898, even though they had been enrolled by the Cherokee National Council. The Attorney General's opinion did not even remotely touch their case. The Assistant Attorney General in the Rogers case (see appendix) held admission by the Cherokee National Council the full equivalent of being on the tribal rolls. In the Wiley Adams case and the Vaughan case (see appendix) the Interior Department held that under the Act of 1896 the Dawes Commission had no authority to deny enrolment to persons on the tribal rolls, but simply the ministerial duty of transcription from tribal rolls to the Commission's rolls. The attorneys for the Choctaw Nation likewise so held, for in their brief quoted in the opinion in the Vaughan case by the Assistant Attorney General, they say: "Under the Act of June 10, 1896, the tribal rolls were confirmed (this confirmation was of course removed by the Curtis Act and does not affect the Commission in the exercise of its jurisdiction therein)." These are the contemporaneous views of the legal advisers of the parties most intimately

connected with the matter. They are entirely consistent with the letter of the Act of 1896. Some attempt has been made to hold the contrary because of the provisions of that act as to giving force and effect to tribal laws, customs and usages, but we submit that those provisions applied to the cases of "court claimants" whose enrolment rights were left open to adjudication.

The opinion of the Attorney General in the Randolph-Thompson case likewise would intimate a view that by making "application" under the Act of 1896 parties waived their right to confirmation if on the tribal rolls. Such a contention is unwarranted. Parties cannot *make* legislation and defeat confirmation when so ordained by Congress. Wards or minors cannot waive rights, and the restrictions on alienation show that the enrolled were treated as not *sui juris*. The learned Attorney General talked himself out of this contention when he stated in argument that many of the Indians had to be enrolled and allotted by main force, refusing the valuable rights proffered them.

Furthermore, the Act of 1898 superseded the Act of 1896, and under it there was authority in the Dawes Commission, if it deemed it proper on the facts, to ignore any action taken under the Act of 1896. Of course, it should give weight and effect to any facts developed or findings made in 1896, and not lightly rule to the contrary. We already have shown this Act of 1898 was a comprehensive treatment of the whole matter, and as such supercessory (Tracy *vs.* Tuffly, *supra*), but furthermore, the Act of 1902, in directing that the rolls should be made in "strict conformity to the acts of 1898 and 1900," is convincing that this view is correct—the Act of 1896 being ignored, except to relieve the Nations

of the burden of proof resulting from void court claimants' judgments.

In the case of Goldsby his enrolment (laying aside for the moment any claim the pleadings are sufficient to show, as do the official records, that he was on a tribal roll) was correct. It is conceded that he was enrolled by the Dawes Commission under the Act of 1896, and that that finding was affirmed by the United States District Court. The proceedings in the District Court were annulled and vacated by the Choctaw-Chickasaw Citizenship Court under the Act of 1902. The effect of that annulment of the affirmation of the District Court was to void the District Court's judgment, but to leave still in force and effect, unless his case were transferred to and decided by the Choctaw-Chickasaw Citizenship Court, the original enrolment of Goldsby by the Dawes Commission. His case differs from the Randolph-Thompson case in that the Choctaw-Chickasaw Citizenship Court rendered judgment against Thompson and his sister, Myrtle Randolph, whereas it never heard Goldsby's case at all.

It is attempted, however, to hold that Goldsby properly has no place on the rolls because, although found entitled on the merits of his blood descent by the Dawes Commission in 1896 and the United States District Court on appeal, and then under the Act of 1898 again found entitled on the merits by the Dawes Commission, the Commissioner of Indian Affairs and the Secretary of the Interior, he is barred because he did not remove his successful case to the Choctaw-Chickasaw Citizenship Court. It would be a new departure to find a law compelling a successful litigant to appeal his case or lose his rights. It would be a still wider departure from established legal

principle to find applied to an Indian ward such a new and technical statute of estoppel and limitation—and that where the aim and purpose of Congress, running all through its legislation, was to give every opportunity for fair-dealing on the merits to these Indians who for public policy it was required to compel to abandon their communal life. And Congress by the Act of 1902 did no such radical and wrong thing. The whole support for such a view is found in the opinion of Acting Attorney General McReynolds, cited on page 34 of the original brief of plaintiff in error. Mr. McReynolds so held because he said otherwise the Nations might lose after winning the test case because the Nations "could not transfer a cause to the Citizenship Court." The conclusion falls with its predicate. By some strange oversight Mr. McReynolds wholly overlooked the fact that section 32 of the Act of 1902 expressly gave to the Nations the right of appeal to the Choctaw-Chickasaw Citizenship Court wherever the District Court had admitted parties to enrolment, and equally expressly gave to claimants such right of appeal wherever the District Court had denied them enrolment, provided the District Court judgments were annulled. But this Act of 1902 compelled neither Nations nor applicants to remove cases after annulment of the District Court judgments. The act did not foster litigation. Either the Nations or the claimants could let the matter rest on what the Dawes Commission had done, and thereafter matters would proceed without any weight attaching to the District Court judgments. The right of either party to appeal is expressly stated on page 719 of the opinion of the Circuit Court of Appeals in Wallace *vs.* Adams, 143 Fed., as follows:

> "The act and agreement (that of July 1, 1902) also provided that, in case the Citizenship Court should decide that the judgments of admission to citizenship by the United States courts in the Indian Territory should be annulled or vacated, the papers in any action and that suit, wherein such a judgment had been rendered, should, *upon seasonable application of either party*, be transferred to the Citizenship Court, which should proceed to a hearing and determination of it as the United States Court ought to have proceeded; that the Citizenship Court should have appellate jurisdiction of the judgments of the United States courts in citizenship cases, and that its judgments should in all cases be final."

The same view was expressed in the brief of the attorneys for the Choctaw and Chickasaw Nations cited in the Assistant Attorney General's opinion in the Vaughan cases (seen appendix hereto), for they state that the effect of the decision of the Choctaw-Chickasaw Citizenship Court in annulling and vacating as void for want of notice to both Nations the judgments of the district courts was to leave matters where "the 1896 proceedings should be eliminated entirely and their citizenship rights determined under the Curtis Act and later acts."

A similar statement of the views of the attorneys for the Choctaw-Chickasaw Nations as to the effect of their success in the ten test suits under the Act of 1902 is found on page 149 of the published volume entitled "Laws, Decisions and Regulations Affecting the Work of the Commissioner to the Five Civilized Tribes, 1893 to 1906," where the Acting Commissioner of Indian Affairs quotes them as advising Clay McCoy as follows:

> "The decision of the Choctaw and Chickasaw Citizenship Court is that all 'court claimants' judgments are void. The effect of this would be of course to leave the judgments of the Dawes Commission as they were before they were appealed from."

We think it conclusively shown that in no event and under no view of the case was there any bar to consideration of Goldsby's case on the merits, and on the merits and facts his rights have been found in his favor and he was placed on a final approved roll, from which he was arbitrarily stricken without notice of any kind and by mistake.

The foregoing leaves out of consideration any claim that under the pleadings Goldsby can assert that he was on a tribal roll. Counsel believe the point of no importance, but believe the statement, not controverted by the answer, on pages 4 and 5 of the transcript of record, that Goldsby had been long recognized by the Choctaw and Chickasaw Nations as a Chickasaw Indian by blood and was an heir of the Indians referred to in the treaty proclaimed in 1856 and the statement in Petitioner's Exhibit A 2 (Rec., p. 18) that he was enrolled in accordance with the opinion in the Vaughan case (of which the court will take judicial notice, Cosmos Explo. Co. *vs.* Gray Eagle Oil Co., 190 U. S., 309), the equivalent of an assertion of right as a tribal roll member.

The subjoined extract from the decision of the Dawes Commission, May 25, 1905, on file in the Indian Office, shows the true fact, however, if the matter were reduced to one of pleading:

> "Upon an examination of the tribal rolls in the possession of the Commission, the names of the

> said John E. Goldsby, Linniel E. Goldsby and Bessie Goldsby are found upon the 1893 Chickasaw Leased District Payment Roll No. 2, page 91, enrolled thereon as citizens by blood of said Nation, and the name of said Sadie Goldsby is found upon roll, page 91, enrolled thereon as a citizen by intermarriage of said Nation."

Application of Goldsby for himself, wife and children, made at Paul's Valley, September 14, 1898, under the Act of 1898:

> "Chickasaw Court Card—*In re* Application of John E. Goldsby *et al.* Sworn by Commissioner McKennon, John E. Goldsby says:
>
> "I am 40. I am husband of Sadie Goldsby and father of Linniel E. and Bessie Goldsby. I live at Wayne, Chickasaw Nation. I have lived in the Chickasaw country since 1869. I married my wife in 1883. I have always been recognized as a citizen of the Chickasaw Nation, and the reason I made application to the Dawes Commission I was informed that it was necessary for all Indians, and some of them had made application. I have always understood that my mother was 1/16 Cherokee and was adopted by the Chickasaws back in the old country."

While counsel have gone at length into the correctness of the enrolment of their clients, they believe the true issues before the court, and on which the pending cases must turn, are: Had the Secretary jurisdiction to cancel enrolments, especially where allotment certificates had issued, and could he do so without notice? The original enrolments are an admitted fact and must be legally treated as such. The court will not go back of

that. It cannot inquire into what means or methods brought the Secretary to his final approval of the rolls nor whether that final approval was correct. It has no general supervisory power over the Secretary and can only act where he exceeds his jurisdiction or acts arbitrarily, capriciously, and without due process of law. Were defendants in error seeking to compel enrolment the court would not examine into the question whether the Secretary had exercised a correct discretion. The same principle must apply where his discretion, in the only matter in which he had a discretion, favors a suitor.

In De Cambra *vs.* Rogers, 189 U. S., 121, this court said:

> "When a decision has been made by the Secretary of the Interior, courts will not entertain an inquiry as to the extent of his investigation and knowledge of the points decided, or as to the methods by which he reached his determination."

In Riverside Oil Co. *vs.* Hitchcock, 190 U. S., 323, this Court said:

> "Congress has constituted the Land Department, under the supervision and control of the Secretary of the Interior, a special tribunal with judicial functions, to which is confided the execution of the laws which regulate the purchase, selling and care and disposition of the public lands. * * * That the decision of the questions presented to the Secretary of the Interior was no merely formal or ministerial act is shown beyond the necessity of argument by a perusal of the foregoing statement of the issues presented by this record for the decision of the Secretary.

> Whether he decided right or wrong is not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever under those circumstances to review his determination by mandamus or injunction. The Court has no general supervisory power over the officers of the Land Department, by which to control their decisions upon questions within their jurisdiction.
>
> See also West *vs.* Hitchcock, 205 U. S., 80.

The real question then recurs to the Secretary's exercise of the power of cancellation, and on this, the real issue, counsel refer to their original brief. The only point in addition to which counsel wish to refer is the allegation that cancellations were impliedly sanctioned because of the notoriety of exercise of such power. As cancellation means forfeiture of land and money rights, implication is insufficient; but the fact is there was no such notoriety, and counsel doubt whether any Congressman had such knowledge. After diligent search counsel have discovered only two references that in any sense can be claimed to support the statement. In the annual report of the Department of the Interior for 1905, Part 1, Indian Affairs, page 609, there appears the following:

> "From the approved roll of the citizens by blood of the Choctaw and Chickasaw Nations the names of 1,101 persons have been cancelled owing to duplicate enrolments, or the fact that such citizens died prior to September 25, 1902, and the names of 170 persons have been cancelled from the schedules of the Choctaw and Chickasaw freedmen for the same reasons, leaving as the

> actual number of persons entitled to allotment 34,367."

In the annual report for 1906, Indian Affairs, page 621, this appears:

> "In spite of the pains taken by the Commission to make the final rolls accurate from the start, a number of names were placed thereon which should have been omitted, because the persons died prior to September 25, 1902, and were not entitled to enrollment. These frauds did not develop to any great extent until the work of allotment was commenced. Then it was discovered that the names of many Choctaws and Chickasaws who died prior to September 25, 1902, were included in the final roll."

Striking out a duplication of names obviously involved deprivation of no property rights, and dead persons could make no protests, and, moreover, there was specific authority to prevent persons dying too soon obtaining rights, for the Choctaw and Chickasaw agreement, approved July 1, 1902 (32 Stats., 641—Kappler, Vol. I, 776), in section 35, declared:

> "Provided, That no allotment of land or other tribal property shall be made to any person, or to the heirs of any person, whose name is on the said rolls and who died prior to the date of the final ratification of this agreement. (The date was September 25, 1902.) The right of such person to any interest in the lands or other tribal property shall be deemed to have become extinguished and to have passed to the tribe in general upon his death before the date of the final ratification of this agreement."

And it was made a felony to conceal anyone's death with intent to profit thereby.

The Cherokee agreement of the same date contained the same provision with reference to those dying losing allotment and other property rights, except the date was fixed at September 1, 1902.

The reports made to Congress, therefore, did not direct attention to the fact that live persons were being deprived of rights and forfeitures attempted by the Secretary, and the relatively few who suffered before March 4, 1907, were too ignorant, poor and helpless to protest.

**Allotment Gave the Enrolled a Designated and Segregated Tract of Land, Subject to Sale, Lease or Mortgage, with Approval of the Secretary. Many Such Approvals were Made. Such Acts, as Well as the Statutes, are Inconsistent with a Claim That Enrolments were Only Tentative Until Final Closure of Rolls.**

By virtue of the statutes, as soon as enrolled the right accrued to the enrolled to select a named quantity of land in allotment. After nine months, in case no other citizen claimed the same land, an allotment certificate would issue as "conclusive evidence" of the allottee's right to the segregated tract. It would give the allottee's roll number to the appraised value of the land, and be signed by the Dawes Commission. The body would read thus:

> "This certifies that ——— ——— has this day been allotted the following described land, exclusive of a homestead:

| Subdivision. | Sec. | Town. | Range. | Acres. |
|---|---|---|---|---|
| SW/4 | 32 | 2 N. | 7 W. | 160 |

of the Indian base and meridian, containing 160 acres, more or less, as the case may be, according to the United States survey thereof."

The certificate was non-transferrable where there were restrictions on alienation. If the Secretary removed the restrictions it was transferable, regardless of what it might state.

That Congress intended to change the policy and make enrollments and allotments and complete the work *pro tanto* by the agreements of 1902, is shown by a comparison of those acts with the Curtis Law of 1898. By sections 11 and 12 of the Act of 1898 the roll of any tribe was not subject to approval until enrolment was fully completed as to that tribe, and allottees were not entitled to remain in possession until a complete report of all allotments was made to the Secretary and by him confirmed. All mineral deposits were reserved. By the acts of 1902, section 30, citizenship rolls were approved in blocks, allotments made at once, and allotment certificates issued in regular time. Allottees were given the mineral deposits (except coal in the Choctaw Nation) and permitted to operate or lease the same.

The view taken by the Secretary was shown by the fact that he issued regulations after the acts of 1902, whereby sales of lands of allottees were made by his subordinates and approved, and so of leases. No regulation apprised anyone buying of or through the Secretary that his title depended on the Secretary not cancelling the enrolment. On the contrary, the purchaser relied on the Secretary and the enrolment and allotment record.

Is it consistent with a contention that the rolls, until

the ultimate closure of all rolls, were subject to correction and review and that the said rolls until finally closed were simply tentative, that the parties on the lists or partial approved rolls should receive allotment certificates which were declared by Section 23 of the Act of 1902, to be conclusive evidence of their right, title and interest in and to the named tract of land; that they might alienate or dispose of the same if no restrictions against alienation were provided, or in the event restrictions on alienation did apply, then until removed by the Secretary of the Interior; that the lands might be leased and oil and other mineral products taken from them; that patent might issue, and that the lands might be sold or mortgaged? If Congress had intended, as is now claimed, a power of revision, Congress would not have given the party the full privilege of selling, leasing, mortgaging, or otherwise disposing of his land by deed or letter. Congress, instead of providing that allotment certificate and patent should issue to him, would have provided that until the final closing of the rolls no allotment certificate or patent should issue.

Is tentative enrolment or allotment consistent with this provision in the Indian Appropriation Act of March 3, 1903 (32 Stat., 982):

> "And provided further, That nothing herein contained shall prevent the survey and platting at their own expense of town sites by private parties where stations are located along the line of railroads, nor the unrestricted alienation for such purposes when recommended by the Commission to the Five Civilized Tribes and approved by the Secretary of the Interior."

Is it consistent with common honesty to permit parties with official approval to subdivide and sell town lots and yet have no right to enrolment or allotment save at the will of the Secretary?

Section 30 of the agreement of 1902 directed payment to each Chickasaw "immediately after the approval of his enrolment and right to participate in distribution of tribal property as herein provided, the sum of forty dollars."

Is it consistent that a trustee thus should pay out money when enrolment was only tentative? The argument that Congress took such risks is pure assumption unsupported.

The fact is, no one heard of tentative enrolments or allotments until the present proceedings. Such a holding would simply confound confusion. It would mean that at a stroke of the pen an unlimited number of names might be stricken from the rolls and the basis of every right that allottees, vendees, mortgagees or lessees had swept away. If the allottee can be stricken from the rolls, then it is the duty of the Secretary to allot the land to some other tribal member. A Pandora box of litigation would be opened.

> "Statutory provisions must be construed in the light of all that can be done under them." Beavers *vs.* Henkle, 194 U. S., 73.

The reports of the Secretary of the Interior to Congress are uniformly against the contention. Thus in his annual report, dated for 1905, page 45, he wrote:

> "In the Choctaw and Chickasaw Nations there were 66,217 applicants for enrolment. Of this number the rights of all but 2,860 have been de-

> termined, and 1,539 of these are children * * * The entire allotable area of the two nations is 11,153,344 acres, of which 6,413,876 acres have been allotted, leaving 4,739,468 acres still to be disposed of * * * There have already been prepared 33,877 Choctaw and Chickasaw patents." * * *
>
> "Patents covering 6,841 Cherokee allotments and homesteads have been prepared by the Commission and their delivery will be commenced at an early date."

Would patents be delivered if the parties' rights were only tentative?

The true rule as to allotment certificates and the rights of defendants in error was laid down in Wallace *vs.* Adams, 143 Fed., 721:

> "The Commission, under the direction of the Secretary, constitute a special tribunal vested with the judicial power to hear and determine the claims of all parties to allotments of these lands and to execute its judgments by the issue of the allotment certificates which constitute conveyances of the right to the lands to the parties who it decides are entitled to the property. The allotment certificate, when issued, like a patent to land, is dual in its effect. It is an adjudication of the special tribunal, empowered to decide the question, that the party to whom it issues is entitled to the land, and it is a conveyance of the right to this title to the allottee."

The Court, on page 723, intimated that even Congress, after allotment, could not take away the rights of one enrolled, saying:

> "Congress necessarily had the authority under the Constitution at any time before an allotment of land, under its previous acts, had been finally made to the defendant, and his right to the land had thereby become vested, to repeal its previous legislation."

**The Rule That Courts by Mandamus Will Not Aid a Wrong Has No Application.**

The argument at the close by the Attorney-General that even if there were no authority to cancel enrolment of defendants in error, yet mandamus will be refused because it is not a writ of right and will not issue to promote a wrong or manifest injustice, has no application to the pending cases. The argument presupposes a case where a party by his own pleadings shows he is in *pari delicto*, or that if he has a strict technical right its assertion would work a manifest injustice. The several standard works on mandamus cite such cases. They are but applications of the doctrine that a court will not permit itself to aid a wrongdoer, and that one coming into its forum must come with clean hands. The petitions specifically allege that defendants in error were enrolled without any fraud, evasion or concealment on their part of matter of fact or of law, and the answer concedes this. Enrolment was obtained after full, fair hearing. The cancellation of their enrolments was an arbitrary, capricious act, contrary to the genius of our institutions.

Respectfully submitted,

CHARLES J. KAPPLER,
CHARLES H. MERILLAT,
JAMES K. JONES,
*Attorneys for Defendants in Error.*

ERRATA: On page 29 of their original brief counsel erroneously stated that by the Stephens case this Court protected the landed rights of Cherokee intermarried whites marrying prior to 1875. It should have said the Redbird case in 203 U. S.

## Case of Wiley Adams, Choctaw Intermarried.

I. T. D. 4398-1903.

May 21, 1903.

The Commission to the Five Civilized Tribes,
Muskogee, Indian Territory.

Gentlemen:

I have considered the proceedings of your Commission upon the application of Wiley Adams for enrollment as a citizen of the Choctaw Nation. The facts as found by your Commission are that Adams appeared before the Commission in 1896 under the act of June 10, 1896, (29 Stat., 321); that he is a white man, and about 1877 married a Creek, the widow of a Chickasaw citizen, and was by special act of the Choctaw Council, approved November 6, 1884, admitted to citizenship of the Choctaw Nation and has ever since been recognized as a citizen of that Nation and permitted to vote at their elections. His application was denied by the Commission, and no appeal was taken to the courts.

He was borne upon the Choctaw census roll of 1896 as an intermarried citizen. The act of June 10, 1896, (29 Stat., 321-339), provided:

> "That in determining all such applications, said commission shall respect all laws of the several nations or tribes not inconsistent with the laws of the nations, and all treaties with either of said Nations or Tribes, and shall give due force and effect to the rules, usages and customs of each of said Nations or Tribes; *and, provided further,* that the rolls of citizenship of the several tribes as now existing are hereby confirmed, and any

person who shall claim to be entitled to be added to said roll as a citizen of either of said tribes, and whose right thereto has either been denied or not acted upon, or any citizen who may within three months from and after the passage of this act desire such citizenship, may apply to the legally constituted court or committee designated by the several tribes for such citizenship, and such court or committee shall determine such application within 30 days from the date thereof."

Your Commission was of opinion that—

"Under this act the rolls of citizenship of the several tribes as then existing were confirmed and the Commission under said act had the power only to admit to citizenship and to add to said rolls the names of those persons who applied to them for citizenship, and no authority existed giving the Commission at that time power to eliminate from the tribal rolls the name of any one thereon."

His (the applicant's) name appears upon the Choctaw Census Roll of 1896, page 380, No. 14,255, which is the latest roll in possession of this Commission. The Act of Congress of June 28, 1898 (30 Stats., 495) provides:

"Said Commission is authorized and directed to make correct rolls of the citizens by blood of all the other tribes (except Cherokees), eliminating from the tribal rolls such names as may have been placed thereon by fraud or without authority of law, enrolling such only as may have lawful right thereto, and their descendants born since such rolls were made, with such intermarried white persons as may be entitled to Choctaw and Chickasaw cit-

izenship under the treaties and the laws of said tribes."

Not until this act became a law did the Commission have any authority to deal with the applicant's name, and under this act the only power the Commission has is to strike his name from the rolls, provided it is made to appear that it was placed thereon by fraud or without authority of law. No fraud is suggested in the record, and it is conceded that the National Council of the Choctaw Nation in 1884 had the authority to admit this applicant to citizenship in said Nation.

It is, therefore, the opinion of the Commission that its action upon the petition of the applicant for citizenship under the Act of Congress of June 10, 1896, was without authority of law, and of no force and effect upon the status of this applicant as a citizen of the Choctaw Nation, and also that Wiley Adams is a citizen of the Choctaw Tribe of Indians in the Indian Territory, and that his application, therefore, should be granted, and it is so ordered.

The special act of the Nations' Council is no less a law of the tribe than is a general one. It has been one of the well known usages and customs of the several Indian Tribes to adopt persons of other races. Naturalization by one nation of persons of other races or nations is so general as to be almost universal practice. The Act of June 10, 1896, *supra*, conferred upon the Commission no power to strike from the rolls of persons borne thereon by the act and with the full consent of the tribe. The action of your Commission is therefore approved.

Very respectfully,

THOMAS RYAN,
*Acting Secretary.*

**Cases of Vaughans, Blood Choctaws and Choctaw Intermarried.**

I. T. D.
1450-1903.
6585, 7303,
8697, 11952-1904,

J. R. W.
W. C. P.
S. V. P.

DEPARTMENT OF THE INTERIOR,
Office of the Assistant Attorney General,
Washington, March 24, 1905.

The Secretary of the Interior.

Sir:

I received by reference of December 23, 1904, with request for my opinion thereon, the records in the applications of Benjamin J. Vaughan to be enrolled as citizen by intermarriage of the Choctaw Nation, and of his children, Edward A., Grover C., Oscar S., and Benjamin C. (deceased November 10, 1900), to be enrolled as citizens by blood.

About 1882 Benjamin J. Vaughan was married to Emily Burney, a recognized Chickasaw citizen, by blood. The record does not show that his name is found on any of the Chickasaw rolls, but July 22, 1904, the governor of the Nation states in a letter that the father and first three of his children appear upon the leased district payroll of 1896 census roll, and August 22, 1904, counsel for the nation state in a letter that their names "appear upon all the tribal rolls of the Chickasaw Nation." September 20, 1904, in the father's case, and September 23, 1904, in that of the children, the Commission found that November 10, 1896, the principal applicant, as citizen by intermarriage, and the first three children named, as citi-

zens by blood, were admitted to citizenship of the Chickasaw Nation, from which decision the nation appealed to the United States District Court for the Southern District of Indian Territory, which affirmed the decision. December 17, 1902, the Choctaw and Chickasaw Citizenship Court, under the Act of July 1, 1902 (33 Stat., 641, 646-8), set aside the judgment, and no further steps of appeal or certification of the case to the Citizenship Court for a trial *de novo* were taken within the time prescribed by said act, and the Commission decided that:

> In accordance with the opinion of the Acting Attorney General, dated May 9, 1904 (I. T. D., 3824-1904), and the opinion of the Assistant Attorney General for the Department of the Interior, dated July 30, 1904 (I. T. D., 5246-1904), the Commission . . . is without any authority to take any action of any character looking to the enrollment of (the applicants), . . . and it is therefore hereby ordered that the application . . . be dismissed.

November 22, 1904, the Indian Office transmitted the records recommending affirmance of the action of the Commission.

As to the opinion of the Acting Attorney General of May 9, 1904, it must be observed that an opinion, like the decision of a court, applies only to such facts as are predicated as the basis of such opinion or judgment. The question submitted by the Department to the Attorney General was, whether the annulment by the Citizenship Court, of the judgment of the United States District Court, in these appealed citizenship cases, operated to leave the decision of the Commission appealed from in force. This necessarily assumed that the Commission

itself had original jurisdiction to render, and did render, a valid decision.

The point here involved is, whether the Commission in 1896 had original jurisdiction to admit or to deny citizenship to these applicants. It is the settled rule of the Department, in the case of Wiley Adams (I. T. D., 4398), May 21, 1903, and those following it, that the Commission had no jurisdiction under the Act of 1896, *supra*, to admit to citizenship or to refuse to admit to citizenship those borne on the rolls, as the rolls were confirmed by the act, and as to such persons the Commission was without power except the ministerial one of inscribing their names on its roll when they were identified as upon the tribal rolls.

It is also held by the Commission, and by my opinion in the case of Mary Elizabeth Martin (I. T. D., 11856-1904), that intermarriage as to the white person operates under Article XXXVIII of the treaty of April 28, 1866 (14 Stat., 769, 779), as admission to the tribe, and is the full equivalent of enrollment, so that, whether such intermarried person was enrolled or not, the Commission in 1896 were without power to exclude them from the rolls.

It is also conclusively shown that the Choctaw and Chickasaw Nations did not contend otherwise before the Attorney General. It was stated in their brief presented and considered by the Attorney General, that:

> "If there are persons falling within the class to which this brief refers, who had a *tribal enrollment and recognition* as citizens by blood of the Choctaw or Chickasaw Nation, or who have intermarried, in accordance with tribal laws, to citizens by blood or so enrolled and recognized, none

of the proceedings of the Commission to the Five Civilized Tribes or the United States courts can affect or did affect their status one way or the other. Such proceedings are void as held by the Choctaw and Chickasaw Citizenship Court, and are not subjects of consideration as weighing either for or against a citizen applicant. As to persons who are now applicants before the Commission to the Five Civilized Tribes for enrollment, under the Act of Congress approved June 28, 1898, and later acts, their citizenship rights are to be determined upon their *merits,* without reference to what may or may not have been done either for or against them by void proceedings had before the Commission to the Five Civilized Tribes or the United States Court under the Act of June 10, 1896.

As to them the 1896 proceedings should be eliminated entirely and their citizenship rights determined under the Curtis Act and later acts. Our contentions apply and can apply only to those persons falling within this class who have *no* tribal enrollment and recognition, or who have *not* intermarried with citizens by blood in accordance with the tribal laws, but who rely as a basis for their citizenship upon proceedings had under the act of June 10, 1896.

We submit that the act of June 10, 1896, is itself conclusive of the correctness of this view. Furthermore, in addition to the construction which must appear from an examination of the face of the act itself, the Department of the Interior has so held in the noted Choctaw enrollment case of Wiley Adams. Under the Act of June 10, 1896, *the tribal rolls were confirmed* (this confirmation was of course removed by the Curtis Act and does not affect the Commission in the exercise of its jurisdiction therein); and by the Wiley Adams case it is held that the Act of

June 10, 1896, means what it says; and that as to persons having a *tribal status* the Commission acquired no jurisdiction over them; and anything which may have been done thereunder either for or against them was in excess of the Commission's jurisdiction and is to be given no consideration."

The Acting Attorney General, May 9, 1904, stated the contention, the question submitted, and his opinion as follows:

"It is now maintained by the Indian Nations that it was the duty of applicants, decrees in whose favor were annulled and who desired to insist on their claims, to give notice and transfer their causes to the Citizenship Court, as provided by statute, and to have the same determined. On the other hand, the applicants insist that annullment of judgments of United States courts in their favor left the action of the Commission to the Five Civilized Tribes admitting them to enrollment in force, and that they are now entitled to rely upon the same and to be recognized as citizens.

In view of the foregoing facts, and to enable you to determine what course to pursue, you request my opinion 'whether the annulment of the United States Court judgment affirming a favorable decision of the Commission to the Five Civilized Tribes upon an application for citizenship so far deprived the applicant of a favorable judgment as to devolve upon him the duty of causing his cause to be transferred to the Choctaw and Chickasaw Citizenship Court, as provided in section 31 of said Act of July 1, 1902, to protect and preserve his claimed rights, or whether the annulment of the United States Court judgment revived and put in force and effect the judgment of

> the Commission to the Five Civilized Tribes admitting such person to citizenship.'
>
> * * * * * * * *
>
> I am of opinion that annulment of the United States Court judgment affirming a favorable decision of the Commission to the Five Civilized Tribes upon an application for citizenship so far deprived the applicant of a favorable judgment as to devolve upon him the duty of causing his cause to be transferred to the Citizenship Court. I am further of opinion that annulment of the United States Court judgment did not revive and put into force and effect the judgment of the Commission to the Five Civilized Tribes admitting such person to citizenship, and that enrollment by the Commission based upon such a theory would be a clear violation of the rights of the Indian Nations."

It is obvious that the question here presented was not in the contentions considered by the Attorney General, and whether the general terms of the opinion might be wide enough to cover such case, yet the opinion cannot be construed to apply to or affect a case wherein the Commission in 1896 was without jurisdiction to deny citizenship to the applicant.

My opinion of July 30, 1904, in Dr. Clay McCoy (I. T. D., 5246-1904), is also cited by the Commission as authority preventing its consideration of the present cases. McCoy, a white man, April 17, 1896, in conformity to Chickasaw law, married an enrolled citizen by blood of the Chickasaw Nation, and had continuously lived with her in the Nation. He applied to the Commission, and his enrollment was allowed November 26, 1896, and upon appeal of the Chickasaw Nation the decision was

affirmed by the United States District Court, March 15, 1898. This judgment was vacated December 17, 1902, by the Citizenship Court under the Act of July 1, 1902, *supra*, and no appeal was taken or certification obtained of the case to that court. After rendition of the Attorney General's opinion of May 9, 1904, *supra*, the Commission, making reference thereto, held that:

> "In view of this recent opinion, the Commission is apparently without further jurisdiction or authority in any manner to determine the application of Clay McCoy for enrollment as a citizen by intermarriage of the Chickasaw Nation. Seemingly his failure to appeal or have certified to the Choctaw and Chickasaw Citizenship Court the record in the case before the United States Court for the Southern District of the Indian Territory has so far deprived him of a favorable judgment as to prohibit his enrollment as an intermarried citizen of the Chickasaw Nation."

The Indian Office recommended that the Commission be advised that it was without authority to take action of any character looking to the enrollment of Clay McCoy or any person similarly situated. Setting out sections 27, 28 and 34 of the Act of July 1, 1902, *supra*, I expressed the opinion that:

> McCoy was clearly a person whose right was "contested" within the meaning of section 21. Whether he was or was not made a party to the representative suit contemplated by sections 31, 32, 33, he had right to be made a party on application, and the judgment in the action operated to annul the favorable judgment that he before had recovered.

Upon re-examination of the files referred in the case of Dr. Clay McCoy, I find that neither by brief of counsel nor suggestion of the Commission, Indian Office, or letter of reference, was it called to my attention that there was lack of original jurisdiction to exclude the applicant. Nor were the opinion and brief of counsel upon the question submitted to the Attorney General then before me. I was led to assume that McCoy's case was within the question then submitted and was controlled by the decision. That assumption was clearly erroneous in fact and for that reason, and reasons stated herein, and in the case of Mary Elizabeth Martin I recede from the opinion then expressed, and am of opinion that the Commission is not precluded by the opinion of the Attorney General of May 9, 1904, from consideration of the present cases, or those of like facts, upon their merits.

Very respectfully,

FRANK L. CAMPBELL,
*Assistant Attorney General.*

Approved:
March 24, 1905.
E. A. HITCHCOCK,
*Secretary.*

**Case of Angeline White, Choctaw Intermarried.**

Land 9,918—1905.

I. T. D. J. R. W.
6226, 7604. S. V. P.
9467-1904. W. C. P.

DEPARTMENT OF THE INTERIOR,

Office of the Assistant Attorney General,

Washington, Jan. 31, 1905.

The Secretary of the Interior.

Sir:

I received by reference of December 27, 1904, with request for my opinion thereon, the record in case of Angeline White, applicant for enrolment as a citizen, by intermarriage, of the Choctaw Nation.

The record shows that Mrs. White has lived in the Nation ever since 1874, when she was two years old. In 1899 she was lawfully married to Livingston B. White, a duly enrolled Choctaw by blood, with whom she has ever since lived as his wife. In 1896 her husband applied to the Commission to the Five Civilized Tribes for her enrolment, which was denied, and no appeal taken. The allegiance to which she was born is not known by any evidence in the record, but the decision states that she is a white woman, and I infer that she was born to the allegiance of the United States. July 20, 1903, a majority of the Commission was of opinion that application was barred by its former adverse decision and

her failure to appeal, and upon that ground denied her enrollment. The minority was of opinion that the failure to appeal from its adverse decision was not a bar to the application, and further that by the later Act of June 28, 1898 (30 Stats., 495) the Commission had jurisdiction to enroll white persons intermarried to Choctaw and Chickasaw citizens entitled to enrolment "under the treaties and the laws of said tribes."

October 23, 1903, the Indian Office concurred in the opinion of the minority of the Commission and recommended that the Commission's decision be disapproved and the Commission be directed to enroll the applicant as an intermarried citizen of the Choctaw Nation. August 2, 1904, the Indian Office states that November 19, 1903, pursuant to departmental instructions, counsel for the Choctaw and Chickasaw Nations were notified that they would be allowed thirty days to file a brief against applicant's enrolment, and, December 19, 1903, in behalf of the Nation, expressed their view in writing to the Commission that the applicant's rights should be adjudicated without reference to any decision under the Act of June 10, 1896.

The Act of June 28, 1898, *supra*, provided:

> Said Commission is authorized and directed to make correct rolls of the citizens by blood of all other tribes, eliminating from the tribal rolls such names as may have been placed thereon by fraud or without authority of law, enrolling only such as may have lawful right thereto, and their descendants born since such rolls were made, with such intermarried white persons as may be entitled to Choctaw and Chickasaw citizenship under the treaties and the laws of said tribes.

This provision gives a power not given under Act of 1896 to eliminate names from the tribal rolls which had obtained a place thereon by fraud or without authority of law, and directs the Commission to make or compile from the tribal rolls a correct roll, and to add two classes of persons, whether found upon the tribal rolls or not—viz.: descendants born to lawfully enrolled persons after date of such tribal rolls, and such white persons as were intermarried with lawfully enrolled Choctaw or Chickasaw citizens, and who are entitled under the treaties and laws of such tribes to citizenship therein.

The applicant herein is clearly within Article XXXVIII of the treaty of April 28, 1866 (14 Stats., 769, 779,) between the United States and the Choctaw and Chickasaw Nations. By the terms of that provision she "is to be deemed a member of said nation." The Act of June 28, 1898, *supra*, expressly directs the Commission to enroll this class of persons, and the act being later in time and unequivocal in terms, without exception or limitation, is an express mandate to the Commission regardless of any former adverse action it may have taken in such case.

I therefore concur in the view of the minority of the Commission and that of the Indian Office, and am of opinion that the Commission should be directed to enroll the applicant.

Very respectfully,

FRANK L. CAMPBELL,
*Assistant Attorney-General.*

Approved:

January 31, 1905.

E. A. HITCHCOCK,
*Secretary.*

## Cases of Rogers' Children, Blood Cherokees.

Land 25,466—1905.

I. T. D.
6340-1904.

J. R. W.
W. C. P.
S. V. P.

DEPARTMENT OF THE INTERIOR,

Washington, March 25, 1905.

The Secretary of the Interior:

Sir:

I received by reference of February 27, 1905, the motion for review and rehearing and accompanying papers in the application of Stonewall J. Rogers for enrolment of his children, Fannie L., Robert K., Mary L., and Henry C., as citizens by blood of the Cherokee Nation.

October 14, 1887, Rogers, then aged twenty-one years, with Henry C., his father, a brother, and three sisters, were admitted by the Cherokee national authorities as citizens by blood of the Cherokee Nation. There is no claim or suggestion that this was procured by any fraud or was in any wise without authority of law. Henry C. removed to the Nation before December 4, 1894, was on the 1890 census roll, Cooweescoowee district, and died there March 5, 1896. Stonewall J. did not remove to and locate permanently in the Cherokee Nation until January, 1896. At the time of his admission to citizenship in 1887 he was an express messenger on the Southern Railway system on a route between Selma, Alabama, and Cleveland, Tennessee. He intended to remove to the

Territory to locate permanently, and contributed from his wage savings to aid the family in improving a farm held in common, which has improvements said to be worth $2,000, but no act indicative of change of his own domicile to the Territory is shown until his removal, January, 1896.

July 21, 1896, he married Annie Kelley, a white woman, at Cleveland, Tennessee. His wife remained in Tennessee to care for her mother to her mother's death, and joined her husband in the Nation in the spring of 1899, in the home he had made for them there.

September 8, 1896, he applied to the Commission for enrolment of himself and his children, which was denied, and no appeal was taken therefrom. The record of that proceeding is not before me, and the ground upon which enrolment was then denied does not appear. He applied again November 17, 1900, and November 19, 1900, was denied upon two grounds: (1) that he was barred by the Cherokee Act of December 4, 1894, which required absent citizens to permanently locate within the Nation by June 4, 1895, and his return to the National was not until January, 1896; (2) that he was barred by failure to appeal from the former action denying his enrolment. Upon a third application the Commission, May 20, 1902, reviewed and affirmed that action. This was affirmed by the Department, November 6, 1902, and July 20, 1903, a motion for review was denied. July 30, 1904, the present motion, supported by brief of counsel, was filed, and with the record is referred to me for opinion.

The point of motion is that, as Henry C. Rogers, ancestor of the minor applicants, was born on the tribal rolls of 1890, and they are his descendants born since that

time, and are entitled to enrolment under Section 21 of the Act of June 28, 1898 (30 Stats., 495, 502-3), for enrolment of such persons borne on the tribal rolls "as may have lawful right thereto, and their descendants born since such rolls were made."

I am of opinion that this contention can not be sustained. Allegiance of birth follows that of the immediate ancestor. Where continuity of allegiance is not maintained through the line of descent, the descendant is not born to the allegiance of the remote ancestor, as a grandparent, but to that of the parent at the time of birth. Where expatriation of a nearer ancestor occurs, the continuity of allegiance is broken from that of the remote ancestor, and allegiance of birth is the sovereign to whom the allegiance of the nearer ancestor is due. The right of the minor children of Stonewall J Rogers must therefore be determined by that of their father at the time of their birth.

Stonewall J. Rogers was admitted to allegiance of the Cherokee Nation and was a Cherokee citizen until the full expiry of the time fixed by the Cherokee Act of December 4, 1894, viz.: to and including June 4, 1895, and he did not forfeit or lose his Cherokee citizenship until that day expired. His children born to that time were born to the Cherokee allegiance of their father.

The record before me is defective in that the dates of birth of his three older children are not fixed by the record, but their ages are testified to by him generally on November 17, 1900, as "Fannie L., age 7 years; Robert K., age 5 years; Mary L., age 11 months." The fourth child, Henry C., is shown by a birth certificate to have

been born "January 31, 1902." It is thus shown that the two younger children were born after June 4, 1895, when their father was barred of his citizenship. By break in the continuity of allegiance and expatriation of their parent, I am of opinion that they can not claim Cherokee citizenship by virtue of descent from their grandfather, a more remote ancestor, who was a Cherokee citizen.

The oldest child, Fannie L., being aged 7 years in 1900, was born before the Cherokee Act of expatriation of absentee citizens took effect against her father, and she was born to Cherokee allegiance, as also may have been the second child, Robert K. The Cherokee expatriation Act of 1894 expressly excepted minors. As to her, and perhaps also Robert K., the act had no effect. She and, perhaps, Robert K., have not lost their right, unless barred by failure to appeal from the adverse decision of the Commission in 1896.

I am of opinion that the failure to appeal did not bar Rogers' child, or children, for the reason that the act of admission was a complete recognition by the Nation of Stonewall J. Rogers' right, *and the full equivalent of an entry of his name upon the tribal roll. The act of inscription on the tribal roll was merely clerical and ministerial, not the admission itself.* (Italics ours.) When that inscription was made, or whether or not it ever was made, to all legal intents and purposes, it must be regarded as done when the merits of his application and his right to enrolment was found and declared, October 14, 1887. To all legal intent he was then enrolled, and his child or children born while he was yet in Cherokee citizenship were his "descendants born since such rolls were

made." As in 1896 the Commission had no power to exclude enrolled citizens, they were without jurisdiction to deny enrolment of such child, or children, and the denial of their enrolment is no bar to the hearing of their case upon the merits.

Very respectfully,

FRANK L. CAMPBELL,
*Assistant Attorney-General.*

Approved:

March 25, 1905.

E. A. HITCHCOCK,
*Secretary.*

## Cases of Myrtle Randolph and W. T. Thompson, Choctaws, Opinion of the Attorney General.

DEPARTMENT OF JUSTICE,

Washington, February 19, 1907.

The Secretary of the Interior:

Sir:

I have the honor to communicate to you my opinion in certain Choctaw Indian citizenship cases, the first two submitted by your letter of May 29, 1906, and the others by the direction of the President under date of January 19, 1907.

1. The first case is that of Myrtle Randolph and her brother, W. J. Thompson, in regard to which you say:

> Myrtle Randolph and W. J. Thompson are children of Giles Thompson, white, intermarried in the Choctaw Nation in Mississippi prior to the treaty of September 27, 1830 (7 Stat., 333), and was one of the parties named by supplementary Article II (ib. 340), as entitled to a section and a half, reserved to him from the ceded lands, to be so selected as "to include their present residence and improvement." His first and second wives were Choctaws. His name appears on page 64, Volume VII, American State Papers (Public Lands), as a beneficiary of Article XIX of the treaty of September 27, 1830, and on page 28, Volume I, of the record in suit of the Choctaw Nation *vs.* United States, Court of Claims. He was registered under the treaty as citizen of

the Choctaw Nation, Mushulatubbee's District, and with his family was transported under the treaty as Choctaws, at expense of the United States, from Mississippi to the Choctaw Nation, west, prior to October 24, 1833, when he petitioned the President, from Doakesville, near the Red River, in the southern part of the Choctaw Nation, to approve sale of his Mississippi lands to James Gay, of Mississippi, and for issue of patent therefor (copy A enclosed). In the Choctaw Nation, west, in Indian Territory, in 1863, in accordance to Choctaw law, he married a white woman, citizen of the United States, of whom the applicants were born. He was living October 19, 1865, and was paid by the Choctaw Nation for beeves furnished June, 1865. (Copy of Act of Council of October 19, 1865, is enclosed, B.) He continued to live in the Nation, and was recognized as a citizen, until his death, aged seventy-six years, and his estate was administered in the Choctaw courts as that of an Indian and within their jurisdiction. The applicants—his children—were born in the Choctaw Nation, were admitted to and attended the Choctaw schools as Choctaws, and in all respects enjoyed and were accorded the privileges of native-born Choctaws. The applicants were enrolled by Choctaw Committee on Citizenship in 1892, as Choctaw citizens. The Department is not yet advised whether they are borne on any other of the Choctaw rolls. They settled and improved tribal lands, as the father before had done in Mississippi, as Choctaws, erected homes, and were never ousted or objected to or regarded as intruders.

September 8, 1896, these applicants and others applied to the Commission to the Five Civilized Tribes for enrollment under the Act of June 10, 1896 (29 Stat., 321, 339), and December 7, 1896, were denied. Applicants appealed to the United

States Court, Southern District, Indian Territory, which, January 18, 1898, reversed the Commission, and admitted the applicants. From this judgment the Nation appealed and the judgment was affirmed (reported as Stephens *vs.* Cherokee Nation and Choctaw Nation *vs.* Robinson, 174 U. S., 445, footnote, page 469, case No. 587; Same *vs.* Randolph *et al.*) Subsequently, under the Act of July 1, 1902 (32 Stat., 641, 646-9), the matter was brought by appeal of the nations to the Choctaw-Chickasaw Citizenship Court, which, November 29, 1904, denied the application—copy of opinion wherein and in Wall. *vs.* Choctaw Nation *et al.*, and in E. H. Bounds *vs.* Choctaw and Chickasaw Nations, wherein both were founded, are enclosed (C. D. E.).

The validity and finality of the Citizenship Court are therefore a vital feature of this case. In regard to its judgment you say in your letter:

> Bearing upon the validity of this judgment, your attention is called to the fact that the Act of June 10, 1896, gave no power to the Commission to the Five Civilized Tribes to purge the tribal rolls, which were by the act confirmed. Power to purge the rolls was first conferred on the Commission by the Act of June 7, 1897 (30 Stat., 84), and further by section 21, Act of June 28, 1898 (30 Stat., 495, 502). Wherefore this Department holds that no jurisdiction was given the Commission, or to the courts on appeal therefrom, to exclude persons having tribal recognition and borne on the tribal rolls, but that such persons, notwithstanding prior adverse action by the Commission, or the courts, are entitled to enrollment under the Act of 1898, and supplementary acts, unless their inscription on the tribal rolls

> was procured by fraud or was without authority of law. Such has been the rule of this Department since decision in the case of Wiley Adams, May 21, 1903, discussed and concurred in by the Assistant Attorney General, Interior Department (opinions of March 24, 1905), in cases of Benjamin J. Vaughan and Mary Elizabeth Martin. In Vaughan's case counsel for the Nations acceded to it as the proper rule.

To determine the validity and the finality of the judgment of the Citizenship Court, as well as other questions arising in these cases, it is necessary to consider carefully the entire legislation of the Congress on this subject. * * *

> (Note: Here the acts in reference to the Five Civilized Tribes are set forth *in extenso.*)

It appears that the agreement (that of July 1, 1902, with the Choctaws and Chickasaws) in these paragraphs provides for the establishment of the Choctaw and Chickasaw Citizenship Court, and gives it jurisdiction of a test suit to annul and vacate the decisions of the United States courts in the Indian Territory admitting persons to citizenship and enrollment as citizens of the Choctaw and Chickasaw Nations, respectively, on the ground of want of notice to both of said Nations, and because the United States courts tried such cases *de novo,* with a right in the event such judgments should be annulled because of either or both of the irregularities mentioned, on the part of any party thus deprived of a favorable judgment to remove his case to the Citizenship Court, where such further proceedings were to be had therein as ought to have been had in the court to which the same was taken on appeal

from the Commission to the Five Civilized Tribes, and if no judgment or decision had been rendered therein; and also "appellate jurisdiction over all judgments of the courts in Indian Territory, rendered under said Act of Congress of June 10, 1896, admitting persons to citizenship or to enrollment in either of said Nations." In the exercise of such appellate jurisdiction the Citizenship Court was "authorized to consider, review, and revise all such judgments, both as to findings of fact and conclusions of law, and may, whenever in its judgment substantial justice will thereby be subserved, permit either party to any such appeal to take and present such further evidence as may be necessary to enable said Court to determine the very right of the controversy."

It will be noted that the agreement further provides (paragraph 33) that "the judgment of the Citizenship Court in *any or all* of the suits or proceedings so committed to its jurisdiction *shall be final.*"

> (Here section 34, agreement of July 1, 1902, and acts of April 21, 1904; March 3, 1905, and April 26, 1906, are set forth.)

By the Act of April 26, 1906, the rolls of citizenship of the several tribes were required to be completed by March 4, 1907.

After very carefully considering this legislation, in the light of the circumstances under which it was enacted, I am constrained to the conclusion that the Citizenship Court had jurisdiction of the cases now under consideration, and that its judgment therein is final.

By the Act of June 10, 1896, the Commission to the Five Civilized Tribes was "authorized and directed to proceed at once to hear and determine the application of

*all* persons who may apply to them for citizenship in any of said Nations." It is true that this act also confirmed the then existing rolls of the several tribes, but the question whether an applicant was, as matter of fact, already duly enrolled upon one of the rolls so confirmed constituted, in my opinion, an issue upon which the Commission was authorized and required to pass; the applicant may be fairly held to have waived by his application the conclusiveness of the confirmation of the rolls in his case.

Independently of any such waiver, I do not see how the proposition that the Commission did not have jurisdiction of the case of a person whose name was upon a tribal roll can be maintained, in the face of the provision of the Act of June 10, 1896, that "in determining all such applications said Commission shall * * * give due force and effect to the *rolls*, usages and customs of each of said Nations or Tribes." I think that act left it to the Commission to determine whether or not the applicant was upon a roll which was confirmed, and evidently it did not so hold in these cases.

It is unnecessary, however, to determine what might have been the effect of an adverse judgment in the case of an applicant whose name was upon a roll so confirmed, for such confirmation was certainly and very materially modified by the Act of June 7, 1897, and apparently altogether withdrawn by the Act of June 28, 1898. The Act of June 7, 1897, provided that the words "rolls of citizenship" as used in the Act of June 10, 1896, should be construed to mean the "last authenticated rolls of each tribe which have been approved by the council of the nation." I am informed that there never was any such an authenticated roll of the Choctaw Tribe, either at the time of the passage of the Act of June 10, 1896,

or subsequently thereto. Moreover, by the Act of June 28, 1898, it was provided that in making rolls of citizenship of *the several* tribes, the Commission should take the Cherokee roll of 1880 as the only roll intended to be confirmed by that and preceding acts of Congress; it seems to be clear from the further provisions of the Act that the Congress did not here refer to the Cherokee rolls only but had in mind those of all the tribes. To my mind, however, the decisive consideration is that Congress, knowing there were certain cases of contested citizenship in the Choctaw and Chickasaw Nations, referred these cases, under carefully defined conditions, to the Citizenship Court and made the determination of that Court in those cases final. This provision of law repealed, as to cases in this category, any inconsistent provisions (if any there were) in the Act of 1896 or any other prior act. These cases were unquestionably within the term of the law; the claimants had been admitted to citizenship by decisions of the United States Courts, and it seems clear that, under the agreement with the Choctaw and Chickasaw Nations ratified by the Act of July 1, 1902, it was intended that the Citizenship Court should have a revisory jurisdiction of judgments of the United States Courts in the Indian Territory in citizenship cases, irrespective of the grounds on which these suits had been entertained by the said courts. That agreement was made after the confirmation given to the tribal rolls had been qualified if not withdrawn, and, we must presume, with a knowledge of the fact that the Commission, under the Act of June 10, 1896, had exercised jurisdiction in the case of persons whose names appeared upon some of the rolls of the tribes. Its action seems to show that Congress did not intend to confirm any roll of the

Choctaw and Chickasaw Tribes, but, however that may be, when, with a knowledge of all that had gone before, it created the Citizenship Court, this was done, in my opinion, with the evident purpose of giving it jurisdiction of all citizenship cases which had been decided by the United States courts for the Indian Territory on appeal from the judgments of the Commission. As neither Congress nor the Nations made any distinction in the Act and agreement referred to as to the cases of persons whose names were on a tribal roll which might have been confirmed by the Act of June 10, 1896, if Congress had not decided otherwise, I do not think any other authority can make this distinction. Indeed, as I have suggested, the applicants themselves, having voluntarily submitted to the jurisdiction of the Commission, might be fairly held estopped to now deny it.

I understand that it is not contended, nor do I think it could be successfully maintained, that any authority to review the judgments of the Citizenship Court was intended to be conferred upon you by Congress when it made the rolls, as finally compiled, subject to your approval (see paragraph 30 of the agreement ratified by the Act of July 1, 1902). Neither do I think that the provision in the Act of April 26, 1906, above quoted, as to enrolling persons and entertaining motions to reopen or reconsider citizenship cases, was intended to recognize or confer any such authority, the purpose of that provision being simply to limit the time in which the authority previously conferred might be exercised. To hold this would be to treat the later act as a repeal of so much of the former as expressly declared the judgments of the Citizenship Court to be final, which seems to me untenable.

This disposes of the cases of Myrtle Randolph and her brother, W. J. Thompson; whatever their intrinsic merits, these claims have been finally decided adversely to the claimants by the judgment of the Citizenship Court.

NOTE: After passing on several other cases not deemed material here, the opinion is signed:

Respectfully,

CHARLES J. BONAPARTE,

*Attorney-General.*

notice and opportunity to be heard, strike his name from the list. It would not be due process of law.

30 App. D. C. 177, affirmed.

THE facts are stated in the opinion.

*The Attorney General* and *Mr. Assistant Attorney General Fowler*, with whom *Mr. William R. Harr* was on the brief, for plaintiff in error:

The matters referred to in the petition are within the exclusive jurisdiction of the Secretary of the Interior and not subject to judicial review.

The matters referred to in the petition relate to the allotment of land and distribution of the property of the Chickasaw Nation, one of the Five Civilized Tribes in the Indian Territory. As to this there can be no question. Enrollment is merely an incident of the allotment scheme.

The allotment and distribution of the tribal lands and other tribal property of the Chickasaw Nation is a political matter and within the exclusive jurisdiction of Congress, except as it has otherwise provided. The agencies which Congress chose to execute this work were the Commission to the Five Civilized Tribes, which it especially created for the purpose, and the Secretary of the Interior. Act of March 3, 1905, 33 Stat. 1048–1050.

No court has jurisdiction, unless authorized by Congress, and Congress has expressly refrained from conferring any jurisdiction upon the courts in that regard, although at the same time it has conferred certain jurisdiction upon the Circuit Courts of the United States in respect to allotments elsewhere. Indian appropriation act of August 15, 1894, 28 Stat. 286, 305, as amended by the act of February 6, 1901, 31 Stat. 760; *McKay* v. *Kalyton*, 204 U. S. 458, 468; *Hy-yu-tse-mil-kin* v. *Smith*, 194 U. S. 413; *The Rickert Case*, 188 U. S. 432.

The political character of the legislation of Congress with respect to the allotment and distribution of the property of

the Indian tribes, its plenary authority with respect thereto, and its freedom from judicial control in that regard, have been frequently maintained by the Supreme Court. *Stephens* v. *Cherokee Nation*, 174 U. S. 445; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294; *Lone Wolf* v. *Hitchcock*, 187 U. S. 553.

Even if respondent's predecessor may have acted hastily or illadvisedly, this would not be a sufficient reason to give the courts jurisdiction. *Blackfeather* v. *United States*, 190 U. S. 373.

The legal title to the lands claimed by the relator being still in the United States and the Choctaw and Chickasaw Nations, the lower court should have declined to interfere.

The approval of the Secretary of the Interior of allotments is required by §§ 11, 12 of the act of June 28, 1898, 30 Stat. 495. These provisions, not being inconsistent with the act of July 1, 1902, 32 Stat. 641, are still in force. See par. 68 of the latter act. Under the practice in these matters the Secretary's approval of an allotment is given when he approves the patent therefor. In an opinion rendered May 22, 1905, 25 Opin. A. G. 460, the Attorney General held that the approval of the Secretary of the Interior of patents for allotments in the Choctaw and Chickasaw Nations was necessary in order to transfer the interest of the United States. *Brown* v. *Hitchcock*, 173 U. S. 473, 476; *United States* v. *Schurz*, 102 U. S. 378, 396; *Humbird* v. *Avery*, 195 U. S. 480, 505; *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337, 338; *Love* v. *Flahive*, 205 U. S. 195, 198.

The Secretary of the Interior is given exclusive jurisdiction of all matters relating to the allotment of land. Par. 24, act of July 1, 1902, 32 Stat. 641. This declaration immediately follows the statement in the preceding paragraph that allotment certificates issued by the Commission to the Five Civilized Tribes shall be conclusive evidence of the right of any allottee to the tract of land described therein.

The power of the Land Department to cancel the final receiver's certificate has been often adjudged. *Orchard* v.

*Alexander*, 157 U. S. 372; *Parsons* v. *Venzke*, 164 U. S. 89; *Thayer* v. *Spratt*, 189 U. S. 346; *Hawley* v. *Diller*, 178 U. S. 476.

The courts will not interfere, by injunction or mandamus, with the action of executive officers requiring the exercise of judgment and discretion. *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 324.

Whether a patent shall issue is certainly a matter involving the exercise of judgment and discretion. Mandamus will not lie to compel its issuing. *United States* v. *Commissioner*, 5 Wall. 563; *Secretary* v. *McGarrahan*, 9 Wall. 298.

The utmost the courts have ever done is to compel the delivery of a patent where it has been recorded and the title has passed. *United States* v. *Schurz*, 102 U. S. 378.

The Secretary of the Interior, in the light of the provisions of the statutes relating to these allotments, felt himself authorized to correct any mistakes that might have been made in the approved lists of members of such tribes prior to the time fixed for the completion of the same.

The matter before the court is not affected by the question of vested rights. If by reason of the selection of land made to him the relator has acquired any vested rights therein, as he alleges, he can assert them in the proper court after the title to the land has passed from the United States and the Chickasaw Nation. But that the mere expectation of a share in the property of the nation arising from the fact of his once having been enrolled does not create a vested right therein is settled by the decisions of the Supreme Court. *Stephens* v. *Cherokee Nation*, 174 U. S. 445; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294; *Lone Wolf* v. *Hitchcock*, 187 U. S. 553; *Morris* v. *Hitchcock*, 194 U. S. 384; *Wallace* v. *Adams*, 204 U. S. 415.

*Mr. Charles H. Merillat*, with whom *Mr. Charles J. Kappler* and *Mr. James K. Jones* were on the brief, for defendants in error:

The Secretary of the Interior neither by express grant nor

necessary implication was given authority to strike names from final approved rolls. His jurisdiction ceased with approval of final rolls.

The Secretary of the Interior, having been invested with authority to approve the rolls, his approval, whether right or wrong, is not open for review here. *Steel* v. *St. Louis Smelting Co.*, 106 U. S. 228; *Johnson* v. *Towsley*, 13 Wall. 83.

Having approved the final rolls, the Secretary had exhausted his discretion. His approval of enrollment ended authority in him. *United States* v. *McDaniel*, 7 Peters, 1, 14; *United States* v. *Thurber*, 28 Fed. Rep. 56; *Mosgrove* v. *Harper*, 33 Oregon, 252.

Once declared to be citizens, by operation of law defendants in error became entitled absolutely and of right to a vested interest in tribal lands and funds.

Congress has conferred no power upon the Secretary of the Interior to cancel an allotment certificate. The right to cancel an allotment is a very different thing from the right to cancel a receiver's certificate, and even a receiver's certificate carries with it property rights which may not be lightly set aside by the Secretary. *Orchard* v. *Alexander*, 157 U. S. 372; *Brown* v. *Gurney*, 201 U. S. 192.

The allotment certificates, like certification of lists of lands under these special acts, convey a title as complete as patents. See *Frasher* v. *O'Connor*, 115 U. S. 102; *Noble* v. *Union River Logging Co.*, 147 U. S. 165; *Stark* v. *Starr*, 6 Wall. 402; *Barney* v. *Dolph*, 97 U. S. 652.

Patent to the public lands, it has been held, is but evidence of the right and title thereto of the patentee. The patent being but evidence, relates back to the inception of the equitable right. *Detroit Lumber Co.* v. *United States*, 200 U. S. 335. The allotment certificate by statute is not the equitable right, but the "conclusive evidence" of the right of the allottee. Sec. 23, Choctaw-Chickasaw agreement of July 1, 1902. Enrollment gave a vested right to an undivided share, and the allotment certificate was the conclusive evidence of the right

to a particular segregated tract, and the patent but a more formal and recorded muniment of title. *Wallace* v. *Adams*, 143 Fed. Rep. 716; *Garfield* v. *Frost*, 30 App. D. C. 165.

Even were jurisdiction to cancel names on the final approved rolls conceded, notice and opportunity of hearing in defense are absolute prerequisites to its exercise. *United States* v. *Detroit Lumber Co.*, 200 U. S. 335; *People ex rel. Van Petten* v. *Cobb*, 13 App. Div. N. Y. Reps. 56; *Orchard* v. *Alexander*, 157 U. S. 382; *Atl. Del. Co.* v. *James*, 94 U. S. 207; *Conner* v. *Groh*, 90 Maryland, 686.

While mandamus will not lie to control the discretion of an executive officer or other tribunal, it is the appropriate remedy where the officer charged with a public duty exceeds his jurisdiction, or where, having exercised his discretion, he has exhausted his jurisdiction and subsequently attempts notwithstanding to exceed and abuse his discretion and authority.

The enrollment of defendants in error exhausted judgment, discretion and controversy. *Linn* v. *Belcher*, 24 How. 526; *Steel* v. *St. Louis Smelting Co.*, 106 U. S. 228; *Johnson* v. *Towsley*, 13 Wall. 83; *Noble* v. *Union River Logging Co.*, 147 U. S. 170; *Ex parte Virginia*, 100 U. S. 338; *Ex parte Roberts*, 15 Wall. 385; *People ex rel. Burroughs* v. *Brinkerhoff*, 68 N. Y. 262; *Wise* v. *Biggar*, 79 Virginia, 269; *Crane* v. *Barry*, 47 Georgia, 476; *Raymond* v. *Villere*, 42 La. Ann. 490; *State* v. *Mitchell*, 31 Ohio St. 592; *State ex rel. Brickman* v. *Wilson*, 123 Alabama, 259. See also *Romero* v. *Cortelyou*, 26 App. D. C. 298; *West* v. *Hitchcock*, 19 App. D. C. 333; *Union Pacific R. R.* v. *Hall*, 91 U. S. 343–353; *Illinois Central R. R.* v. *Illinois*, 163 U. S. 142; *Boston T. Co.* v. *Pomfret*, 20 Connecticut, 590; *Schmulbach* v. *Speidel*, 50 W. Va. 553; *Baltimore Univ.* v. *Colton*, 98 Maryland, 623; *Harwood* v. *Marshall*, 9 Maryland, 83; *Jackson* v. *State*, 57 Nebraska, 183; *Dawson* v. *Thurston*, 3 Hen. and M. (Va.) 132; *In re Strong*, 20 Pickering (Mass.), 484; *Puford* v. *Fire Dept.*, 31 Michigan, 000.

The courts have jurisdiction in the premises, inasmuch as the Secretary's discretion had been exhausted. *Foltz* v *St.*

*Louis R. R.*, 19 U. S. App. 581; *Cooper* v. *Reynolds*, 10 Wall. 308; *McLeod* v. *Receveur*, 71 Fed. Rep. 455; *Romero* v. *Cortelyou*, 26 App. D. C. 298.

MR. JUSTICE DAY delivered the opinion of the court.

This action was brought in the Supreme Court of the District of Columbia for a writ of mandamus against the Secretary of the Interior in his official capacity, to require him to erase certain marks and notations theretofore made by his predecessor in office upon the rolls, striking therefrom the name of the relator Goldsby as an approved member of the Chickasaw Nation, and to restore him to enrollment as a member of the nation.

Goldsby, in his petition, claimed that he was a recognized citizen of the Chickasaw Nation and entitled to an equal undivided interest in the lands of the Choctaw and Chickasaw Nations; that he was an owner of an allotment of land which had been made to him as hereinafter stated, and that he was entitled to an equal undivided distributive share of the funds and other lands of the nation. The petition for the writ recites at length the acts of Congress supposed to bear upon the subject, and avers that the Secretary of the Interior on October 6, 1905, affirmed a decision of the Commission to the Five Civilized Tribes, holding that the petitioner and his children were entitled to enrollment, and that relator's name was placed on the final roll of citizenship by blood of the Chickasaw Nation, and that the list was approved by the Secretary of the Interior on November 27, 1905, and that thereafter the petitioner secured an allotment of 320 acres of the allotable lands of the Chickasaw Nation, and an allotment certificate was issued to him by the Commission to the Five Civilized Tribes for the lands thus selected, and the same are now held by him. The petition then goes on to aver, in substance, that relator's name was stricken from the rolls on March 4, 1907. And it is averred that this action was unau-

thorized, was beyond the power of the Secretary, and deprived the relator of valuable rights in the lands and funds of the Choctaw and Chickasaw Nations without due process of law.

The Supreme Court of the District of Columbia issued an order to show cause and the Secretary appeared and answered. The answer, we think, may be fairly construed to contain a denial of the allegation, if the petition might be construed to make the claim, that the relator was an enrolled member of the Chickasaw Nation, but it does admit that he had been enrolled by the Commission to the Five Civilized Tribes; that the list had been approved by the First Assistant Secretary of the Interior, and averred that before the time fixed by Congress for the completion of the rolls of members of the nation the then Secretary of the Interior had disapproved the enrollment of the petitioner and stricken his name from the rolls. The answer admits that the certificate of allotment had been issued to petitioner by the Commission to the Five Civilized Tribes for lands selected by petitioner; and further avers that the Secretary of the Interior had not approved of such allotment, and no patent had been issued therefor.

The answer also admits that it had been the practice of Secretaries of the Interior to give notice before striking names from the approved lists of the Five Civilized Tribes, and avers that owing to the limited time before the expiration of the time fixed by Congress for the completion of the rolls, March 4, 1907, it was impossible to give notice and opportunity to be heard to relator and a large number of other persons. The answer avers that the respondent's predecessor, the then Secretary of the Interior, had no jurisdiction or authority to enroll the petitioner. It also avers that the allotment of lands in severalty of the Chickasaw Nation was delegated exclusively to the Secretary of the Interior. That by the acts of Congress exclusive jurisdiction in matters involving the making of rolls of citizenship of the Five Civilized Tribes was conferred

upon the Secretary of the Interior, and the determination of such matters was within his exclusive judgment and discretion.

A general demurrer was filed to the answer with a note thereto stating that one matter to be argued on demurrer is that the answer sets forth no sufficient reason in law for the cancellation of relator's enrollment by the Secretary of the Interior without notice or hearing. In the Supreme Court of the District of Columbia the demurrer to the answer was sustained upon that ground. The respondent elected to stand upon his answer. Judgment was entered requiring the Secretary to erase from the rolls the statements placed thereon derogatory to the relator's rights in said tribe, and to recognize relator as an enrolled member of the nation. Upon appeal to the Court of Appeals of the District of Columbia this judgment was affirmed (30 App. D. C. 177), and the case comes here.

While it does not appear from the allegations and admissions of the pleadings that Goldsby was an original enrolled member of the tribe, it does appear that under the act of Congress of June 10, 1896, c. 398, 29 Stat. 339, Goldsby made application to the Dawes Commission and was enrolled as a member of the Chickasaw Nation. It appears from a letter of the Secretary of the Interior to the commission, attached as an exhibit to the petition, and dated October 6, 1905, that the Commission to the Five Civilized Tribes, on May 24, 1905, following instructions of the department of April 2, 1905, and in accordance with the opinion of the Assistant Attorney General of March 24, 1905, in the case of *Vaughn et al.*, rescinded its action of September 23, 1904, dismissing the application for the enrollment of Goldsby and his minor children, and held that they should be enrolled as citizens, by blood, of the Cherokee Nation, and that on July 7, 1905, the Indian Office recommended that the commission's decision be approved. The Secretary's letter of October 6, 1905, concluded with a finding that the applicants, including Goldsby, should be enrolled as citizens of the Chickasaw Nation, affirming the commission's